Office-Supreme Court, U.S.
FILED
JUN 26 1981
ALEXANDER L. STEVAS,
CLERK

80-2196

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANTOINE MOWAD,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DOUGLAS GILMORE
11 Harding Lane
Westport, Connecticut 06880
(203) 226-6277

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. Where one objective of a multi-objective federal conspiracy does not state an offense, may the conspiracy conviction stand upon another objective, when the District Court has charged the jury that a conviction could rest on any one objective without violating the Supreme Court's decision in *Stromberg v. State of California?*

II. (a) Did Congress intend for the general conspiracy statute, 18 U.S.C. Section 371, to be utilized to create the unique criminal offense of *conspiracy to attempt?*

(b) Did the Congress intend for the general conspiracy statute, 18 U.S.C. Section 371, to be combined with State Department regulation 22 C.F.R. Section 127.01 to create the unique offense of *conspiracy to attempt* to export without a license?

III. May a lawfully registered exporter of firearms with the Department of State be convicted of an attempt to export firearms without an export license where the specific place, time and manner of the alleged illegal exportation is unknown?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities Cited	v
Cases Cited	v
Constitutional Provisions, Statutes, Regulations and Model Penal Code Section Cited	viii
Opinion Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statutes Involved	2
Regulations Involved	2
Model Penal Code Section Involved	3
Statement of the Case	3
Reasons for Granting the Writ	7

I

1. The Federal Circuits Are Divided As To Whether A Multi-Objective Federal Conspiracy Conviction May Stand When One Objective Is Found Not To State An Offense And The District Court Has Charged The Jury That A Conviction May Rest Upon Any One Objective. 7

2. The Question As To Whether A Conspiracy May Stand If One Objective Of A Multi-Objective Conspiracy Does Not State An Offense When The District Court Charges That Proof Of Any Objective Is Sufficient For Conviction, Is Of Extraordinary Importance In The Administration Of Federal Criminal Justice, Inasmuch As The Issue Concerns Whether A Criminal Defendant May Be Convicted Of A Conspiracy When A Jury Has Not Found Beyond A Reasonable Doubt That The Defendant Has Conspired To Commit "Any Offense Against The United States". 9

PAGE

(a) If this question is not resolved, the public's confidence in the federal criminal justice system will be seriously jeopardized. 9

3. The Affirmance Of Petitioner's Conspiracy Conviction Under The Minority Rule Followed By The Second Circuit, Is Contrary To The Supreme Court's Decision In *Stromberg v. State Of California*. 11

4. The Rationale For The Second Circuit's Minority Rule Is Contrary To Overwhelming And Unequivocal Supreme Court Precedent. .. 12

5. The Second Circuit's Minority Rule Is Contrary To The Supreme Court's Principle Of Lenity. 13

6. The Affirmance Of Petitioner's Conviction On A Multi-Objective Conspiracy Charge Where One Objective Was Found Not To State An Offense, In Light Of The District Court's Instruction That Guilt Need Only Be Found As To One Objective, Is Egregious Error Of Sufficient Importance To Require The Supreme Court To Exercise Its Supervisory Powers To Correct. 14

II

7. Congress Never Intended To Create The Offense Of Conspiracy To Attempt, And For The Federal Courts To Hold Otherwise Is To Legislate An Absurd Judicial Offense Which Is Contrary To The Purpose And Function Of Both The Conspiracy And Attempt Doctrines, And As Such Raises An Important Question Concerning The Administration Of Federal Criminal Justice And The Interpretation Of An Important Federal Criminal Statute Which This Court Pursuant To Its Supervisory Powers Must Resolve. 17

(a) Since failure to consummate the crime is a traditional element of an attempt, a

PAGE

conspiracy to attempt is an agreement to fail to commit the object of the attempt, and as such is not an unlawful agreement to commit an "offense against the United States" as required by 18 U.S.C. Section 371. 21

III

8. A Defendant May Not Be Convicted Of A Federal Criminal Attempt If It Is Unknown Exactly When, Where Or How The Alleged Substantive Offense Will Occur. 22

(a) The Court of Appeals' decision has removed the elements of time and distance from the federal attempt doctrine, which if permitted to stand, will so broaden the attempt doctrine that a determination as to when the imperceptible boundary of attempt is crossed will be subject to constitutional claims of void for vagueness and double jeopardy under the Fifth Amendment to the United States Constitution. 22

CONCLUSION 30

APPENDIX 1a

United States v. Mowad, 641 F.2d 1067 (2d Cir. 1981), ... 1a

Order Denying Rehearing En Banc 13a

Superseding Indictment 14a

Defendant's Motion for Arrest of Judgment 19a

Defendant's Motion for New Trial 20a

District Court's Jury Charge on Count III—Conspiracy 21a

Note From Jury 29a

Amended Order of District Court 30a

Statutes Involved 31a

Regulations Involved 33a

Model Penal Code Section Involved 34a

PAGE

TABLE OF AUTHORITIES CITED

CASES

American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946). 13

Bell v. United States, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955). 13

Callanan v. United States, 364 U.S. 587, 81 S.Ct. 321, 5 L.Ed. 2d 312, (1961), *rehearing denied*, 365 U.S. 825, 81 S.Ct. 687, 5 L.Ed. 2d 703 (1961). 13

Iannelli v. United States, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed. 2d 616 (1975). 13,21

Moss v. United States, 132 F.2d 875 (6th Cir. 1943). . 8

Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), *rehearing denied*, 329 U.S. 818, 67 S.Ct. 26, 91 L.Ed. 697 (1946). 13

Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed. 2d 493 (1971). 13

Samora v. United States, 406 F.2d 1095 (5th Cir. 1969). 28

Samuel v. United States, 169 F.2d 787 (9th Cir. 1948). 8

Stromberg v. State of California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). 8,11-13

Swan and Finch Company v. United States, 190 U.S. 143, 23 S.Ct. 702, 47 L.Ed. 984 (1902). 23,28

United States v. Alvarez, 610 F.2d 1250 (5th Cir. 1980). 19

United States v. Baranski, 484 F.2d 556 (7th Cir. 1973). 8,11,12

United States v. Bass, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed. 2d 488 (1971). 13,14

PAGE

United States v. Carman, 577 F.2d 556 (9th Cir. 1978). 8,11

United States v. Clay, 495 F.2d 700 (7th Cir. 1974), *cert. denied*, 419 U.S. 937, 95 S.Ct. 207, 42 L.Ed. 2d 164 (1974). 18

United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), *cert. denied*, 324 U.S. 920, 72 S.Ct. 362, 96 L.Ed. 688 (1952). 28

United States v. Dansker, 537 F.2d 40 (3rd Cir. 1976). 7,12

United States v. Dixon, 536 F.2d 1388 (2d Cir. 1976). 8,12

United States v. Feola, 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed. 2d 541 (1975). 20

United States v. Gradwell, 243 U.S. 476, 37 S.Ct. 407, 67 L.Ed. 857 (1917). 14

United States v. Gurrola-Garcia, 547 F.2d 1075 (9th Cir. 1976). 28

United States v. Jackson, 560 F.2d 112 (2d Cir. 1977), *cert. denied*, 434 U.S. 941, 98 S.Ct. 434, 54 L.Ed. 2d 301 (1978). 19

United States v. James, 528 F.2d 999 (5th Cir. 1976), *cert. denied*, 429 U.S. 959, 97 S.Ct. 382, 50 L.Ed. 2d 236 (1976). 8

United States v. Lizarraga-Lizarraga, 541 F.2d 826 (9th Cir. 1976). 28

United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114, 95 S.Ct. 792, 42 L.Ed. 2d 812 (1975). 19,26

United States v. Manley, 632 F.2d 978 (2d Cir. 1980). 19,26,28

United States v. Meacham, 626 F.2d 503 (5th Cir. 1980). 18,21

PAGE

United States v. Monholland, 607 F.2d 1311 (10th Cir. 1979). 26

United States v. Mowad, 641 F.2d 1067 (2d Cir. 1981). 8

United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976). 19,26

United States v. Stallworth, 543 F.2d 1038 (2d Cir. 1976). 19,21,26,28

United States v. Swarovski, 557 F.2d 40 (2d Cir. 1977), *cert. denied*, 434 U.S. 1045, 98 S.Ct. 889, 54 L.Ed. 2d 796 (1978). 28

United States v. Tanner, 471 F.2d 128 (7th Cir. 1972), *cert. denied*, 409 U.S. 949, 93 S.Ct. 269, 34 L.Ed. 2d 220 (1972). 8

United States v. Tarnopol, 561 F.2d 466 (3rd Cir. 1977). 7

United States v. Wendelstedt, 589 F.2d 239 (8th Cir. 1978). 8

Van Liew v. United States, 321 F.2d 664 (5th Cir. 1963.) 8

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND MODEL PENAL CODE SECTION INVOLVED

Constitution of the United States, Fifth Amendment, Due Process Clause 2

Constitution of the United States, Fifth Amendment, Double Jeopardy Clause 2,22

Title 18 U.S.C. Section 371 10,15,16,18-22

Title 18 U.S.C. Section 922(a)(1) 2,3,6,16

	PAGE
Title 18 U.S.C. Section 924(a)	2
Title 21 U.S.C. Section 846	2,20
Title 21 U.S.C. Section 963	2,20
Title 22 U.S.C. Section 401(a)	2,3
Title 22 U.S.C. Section 2778(b)(1)	2,6,15-16,18,23,28
Title 22 U.S.C. Section 2778(c)	2,3,18,28
Title 22 C.F.R. Section 122.01(a)	2,6,16,23
Title 22 C.F.R. Section 123.01	2,3,24
Title 22 C.F.R. Section 127.01	2,18,20
Title 22 C.F.R. Section 127.03	2,3
Model Penal Code, Section 5.01	3,19,27

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANTOINE MOWAD,

Petitioner,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Antoine Mowad respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 17, 1981.

OPINION BELOW

The judgment of the United States Court of Appeals for the Second Circuit was rendered on February 17, 1981, and is reported in *United States v. Mowad*, 641 F.2d 1067 (2d Cir. 1981). A copy of the Court's opinion is in the attached Appendix, 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 17, 1981. Petitioner's "Petition For Rehearing With Suggestion For Rehearing En Banc" was timely filed and denied on April 27, 1981. See attached Appendix, 13a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

> Amendment V: No person shall be . . . deprived of life, liberty, or property without due process of law. . .
>
> Amendment V: . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .

STATUTES INVOLVED

Reprinted In The Appendix, 31a

Title 18 U.S.C. Section 371
Title 18 U.S.C. Section 922(a)(1)
Title 18 U.S.C. Section 924(a)
Title 21 U.S.C. Section 846
Title 21 U.S.C. Section 963
Title 22 U.S.C. Section 401(a)
Title 22 U.S.C. Section 2778(b)(1)
Title 22 U.S.C. Section 2778(c)

REGULATIONS INVOLVED

Reprinted in the Appendix, 33a

Title 22 C.F.R. Section 122.01(a)
Title 22 C.F.R. Section 123.01
Title 22 C.F.R. Section 127.01
Title 22 C.F.R. Section 127.03

MODEL PENAL CODE SECTION INVOLVED

Reprinted in the Appendix, 34a

Section 5.01. Criminal Attempt

STATEMENT OF THE CASE

A three Count superseding indictment was filed at New Haven in the District of Connecticut against petitioner, Antoine Mowad, his brother Mylet Mouawad, Sayid Kortobani and Talal Doueihi on May 10, 1979. Count I charged the defendants with knowingly engaging in the business of dealing in firearms without a dealer's license from the Department of the Treasury in violation of Title 18 U.S.C. Section 922(a)(1). Count II charged the defendants with willfully attempting to export Category I firearms, specifically revolvers and pistols of calibre .50 or less, without having first obtained a license from the Department of State in violation of Title 22 U.S.C. Section 401 and 2778(c) and Title 22 C.F.R. Sections 123.01 and 127.03. Count III charged the defendants with conspiracy to 1) engage in the business of dealing as alleged in Count I, and 2) to willfully attempt to export as alleged in Count II. A copy of the superseding indictment is in the attached Appendix, 14a. Petitioner was convicted on all three Counts by a jury before the Honorable Ellen Bree Burns on April 7, 1980. Petitioner was sentenced on April 12, 1980 to two (2) years imprisonment on Counts I and II, the sentences to run concurrently. Imposition of sentence on Count III was suspended with defendant placed on probation for five (5) years. The sentence on Count III to run consecutively to the sentences under Counts I and II.

Petitioner was at all relevant times, and remains today, a lawfully registered exporter with the Department of State, Office of Munitions Control, of Category I and III firearms, the same firearms which are the subject of the indictment. (A-501-502, A-

510-519, Government Exhibits 10 and 11, A-2684-2696).[1] The Director of the Office of Munitions Control, the agency in the Department of State that regulates the exportation of firearms, stated that all registered exporters such as petitioner, are automatically mailed the export applications which are necessary to secure the export license. (A-487, A-529). Petitioner testified he had eighteen at his home in Waterbury, which were mailed to him by the Office of Munitions Control (Defendant's Exhibit 502, A-2766-2773).

The sufficiency of the evidence was challenged as to each Count during the trial. (A-1961-2015, A-2237-2254, A-2445-2465). Post trial motions for Arrest of Judgment, Judgment of Acquittal and New Trial were timely filed, and denied. (A-2776-2791).

Petitioner negotiated with two lawfully registered federal firearms dealerships in Connecticut for the purchase of a small quantity of handguns for export to Lebanon. The negotiations began approximately November, 1978 and concluded with the lawful purchase of 110 handguns on April 6, 1979. The negotiations were conducted with one Vincent Ciulla at the Sportsman's Rendezvous in the town of Milford and one Robert Berger at the Yankee Gun Shop in the adjacent town of Orange. Both Ciulla and Berger were solicited by federal agents to engage as informers, which they did. As a result, several of petitioner's visits at the licensed dealerships were recorded. In the first recordings, informers Ciulla and Berger, unaware that petitioner is a registered exporter, tell petitioner that in addition to selling him firearms, they can also provide the service of flying the firearms anywhere he wishes. The informers propose to petitioner that they will truck as many firearms as he wishes to Hartford's Bradley International Airport, where the weapons will be flown to Canada, loaded onto another plane and taken directly to Lebanon. All petitioner needs to do is agree. He does not agree. (Government Exhibits 1-3, A-2524-2625). The Gov-

1. "A" refers to the Joint Appendix filed by Petitioner in his appeal below to the United States Court of Appeals For the Second Circuit, the Judgment of which is sought to be reviewed here, and the numerical designation represents the page number therein.

ernment's chief informer Ciulla admitted at trial that they could never get petitioner to accept their illegal plans (A-1421, A-1591, A-1601-1603, A-1611-1613, A-1637-1640). The rest of the recorded conversations revert solely to the purchase of a quantity of handguns and their price, without any further reference to the Government's proposition of illegal exportation. (Government Exhibits 4-9, A-2626-2683).

An agreement is finally reached in March to purchase 110 handguns at a specified price, and a down payment is made. After persistent phone calls to petitioner to come pick up the firearms (Government's Exhibit 9, A-2679-2683), he agrees to pick up the handguns at the Yankee Gun Shop in Orange. (Government Exhibit 9, A-2682).

On April 6, 1979, petitioner and his alleged co-conspirators arrive at the Yankee Gun Shop around noon to pick up the handguns (A-1730-1731). The Yankee Gun Shop is on the Post Road in Orange, a major thoroughfare in Connecticut (A-2683). The four arrived in two cars, petitioner's and Kortobani's, with two huge packing crates in one car (Government Exhibit 8, *Crates:* Government Exhibits 14 and 15). One Crate was plainly visible from the rear window of the car (A-1881). Petitioner, who thought the handguns were at the Yankee Gun Shop (Government Exhibit 9, A-2679-2683), is told by informer Berger that the handguns are stored at a nearby warehouse. Petitioner, his three companions and both informers, Ciulla and Berger, then drive in two cars to the warehouse—one of which is Berger's car—*and leave Kortobani's car at the Yankee Gun Shop* (A-1877-1878, A-2082-2084, A-2088). Petitioner's car was seized at the arrest scene, and Kortobani's car was seized at the Yankee Gun Shop, and forfeiture proceedings as to each were instituted by the Government.

Upon arrival at the warehouse, the handguns are packed in the two crates. Each handgun is in its own gun box. The only packing material used were empty Colt boxes—clearly marked "Colt" and emblazoned with the "Colt" logo (Government Exhibit 28). The crates were then tightly nailed shut (Government Exhibit 8, A-1511). The crates were dragged, due to their

extraordinary weight, toward the warehouse bays (Government Exhibit 8), when petitioner and his companions were arrested. No one resisted arrest. The four were unarmed. Both crates were unmarked (Government Exhibits 14 and 15), nor did petitioner or any of his companions have either labels or any marking materials of any kind in their possession, nor did the seizure of petitioner's car at the warehouse, or Kortobani's car at the Yankee Gun Shop, result in the discovery of any such evidence.

In addition, $1,500.00 of the payment for the firearms, made with petitioner's personal check, was drawn on the same bank as petitioner's $500.00 check paid to the Department of State as his export registration fee. (Government Exhibits 10, 11, A-2689, A-2696).

All these facts are undisputed and documented by Government evidence, yet incredibly, none of this is reported in the Second Circuit's decision.

The Government contended that all four men would pile into petitioner's car with these two huge crates, with no labeling or marking materials of any kind, and would immediately drive to some unknown point of export, leaving Kortobani's car back at the Yankee Gun Shop.

Petitioner contended he and his companions planned to return to the Yankee Gun Shop, where they had left their other car, complete the transaction, return to Waterbury with the weapons, and submit his export application as a lawfully registered exporter to the State Department.

Petitioner upon appeal to the United States Court of Appeals for the Second Circuit claimed, inter alia, that Count I—the Section 922(a)(1) dealing charge—did not state an offense against a registered exporter lawfully "engaging in the business of exporting" under 22 U.S.C. Section 2778(b)(1), and 22 C.F.R. Section 122.01; further that petitioner could not be convicted under Count II of a federal criminal attempt where the exact place, time and manner of the alleged illegal exportation was unknown; and that under Count III, since the District Court charged that petitioner could be convicted on either objective of the two-objective conspiracy, the failure of the dealing objective to state an offense, required reversal of Count III. It was

alternately argued that the second objective—*conspiracy to attempt*—did not state an offense, since Congress never intended to create such a charge. The District Court's conspiracy charge is printed in the attached Appendix, 21a. Petitioner's Motion For Arrest of Judgment for failure of the *conspiracy to attempt* charge to state an offense is in the attached Appendix, 19a, as is petitioner's Motion For New Trial for failure to charge the jury as to what constituted the essential elements of a *conspiracy to attempt*, 20a.

On February 17, 1981, the Court of Appeals affirmed in part and reversed in part, and remanded, holding that the Count I dealing charge did not state an offense, but affirming as to Counts II and III. On remand, the District Court dismissed Count I and reduced petitioner's sentence under Count II to eighteen (18) months, with disposition under Count III remaining as before, and to run consecutively. See District Court's "amended order" in attached Appendix, 30a.

Petitioner filed a timely "Petition For Rehearing with Suggestion For Rehearing En Banc", which was denied on April 27, 1981. See attached Appendix, 13a.

REASONS FOR GRANTING THE WRIT

I

1. THE FEDERAL CIRCUITS ARE DIVIDED AS TO WHETHER A MULTI-OBJECTIVE FEDERAL CONSPIRACY CONVICTION MAY STAND WHEN ONE OBJECTIVE IS FOUND NOT TO STATE AN OFFENSE AND THE DISTRICT COURT HAS CHARGED THE JURY THAT A CONVICTION MAY BEST UPON ANY ONE OBJECTIVE.

There currently exists a split among the federal Circuits as to whether a multi-objective federal conspiracy conviction may stand when one objective is subsequently found not to state an offense and the jury has been instructed that a conviction could rest upon any objective. The 3rd, 5th, 7th and 9th Circuits require a reversal when one objective does not state an offense under these circumstances. *United States v. Dansker*, 537 F.2d 40, 51 (3rd Cir. 1976); *United States v. Tarnopol*, 561 F.2d 466,

473-474 (3rd Cir. 1977); *Van Liew v. United States*, 321 F.2d 664, 672 (5th Cir. 1963); *United States v. Baranski*, 484 F.2d 556, 559-561 (7th Cir. 1973) and *United States v. Carman*, 577 F.2d 556, 566-568 (9th Cir. 1978).

However, the 2d, 6th and 8th Circuits take a contrary view. *United States v. Dixon*, 536 F.2d 1388, 1402 (2d Cir. 1976); *United States v. Mowad*, 641 F.2d 1067, 1073-1074 (2d Cir. 1981); *Moss v. United States*, 132 F.2d 875 (6th Cir. 1943); *United States v. Wendelstedt*, 589 F.2d 339, 341-343 (8th Cir. 1978).

Further, both the 5th and 7th Circuits have conflicting panel decisions within their own Circuits:

5th Circuit: *Van Liew v. United States, supra* at 672 and *United States v. James*, 528 F.2d 999, 1014 (5th Cir. 1976), *cert. denied*, 429 U.S. 959, 97 S.Ct. 382, 50 L.Ed. 2d 326 (1976).

7th Circuit: *United States v. Baranski, supra* at 559-561 and *United States v. Tanner*, 471 F.2d 128, 139-140 (7th Cir. 1972), *cert. denied*, 409 U.S. 949, 93 S. Ct. 269, 34 L.Ed. 2d 220 (1972).

The conflict in the 7th Circuit between *Baranski* and *Tanner* was recognized as such in the 9th Circuit's decision in *United States v. Carman, supra*, at 566.

The controversy surrounds in part the Supreme Court's decision in *Stromberg v. State of California*, 283 U.S. 359, 367-368, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931). Both the 7th Circuit in *Baranski, supra*, at 561 and the 9th Circuit in *Carman, supra* at 566, have held that the legal principle in *Stromberg* mandates that where an object of a multi-objective conspiracy fails to state an offense, the conspiracy conviction cannot stand, in light of a jury charge that the conviction may rest upon any one objective, since the reviewing Court cannot be sure that the defendant was convicted upon a legitimate objective which has withstood the test of legal review.

Seven of the federal Circuits have considered this issue, and the 9th Circuit in *Carman, supra*, at 566, has even held that its position is required by an analogous en banc decision, *Samuel v. United States*, 169 F.2d 787 (9th Cir. 1948). There is little likelihood that that further delay in consideration by the Su-

preme Court will resolve the conflict, but rather will continue the discriminatory result from one Circuit to another on an issue where the same multi-objective conspiracy may in one Circuit result in freedom, and in another Circuit, prison. The location of a federal Court should never be the variable that determines the issue of life, liberty, or property. Yet, today, on this question, this is exactly the case.

The issue has been thoroughly considered and is ripe for review. Its resolution must be determined in light of a Supreme Court decision decided in 1931, the application of which to this question may only be finally decided by the Supreme Court. The multi-objective conspiracy charge has become a recurring prosecutorial tool, and the question here presented will only continue to arise with more frequency, and decided discriminatorily, if not finally resolved.

Inasmuch as the federal Circuits remain divided among, and in two instances within themselves, and that the conflict in part revolves around the application of a Supreme Court decision, a traditional ground exists for Supreme Court review.

2. THE QUESTION AS TO WHETHER A CONSPIRACY MAY STAND IF ONE OBJECTIVE OF A MULTI-OBJECTIVE CONSPIRACY DOES NOT STATE AN OFFENSE WHEN THE DISTRICT COURT CHARGES THAT PROOF OF ANY OBJECTIVE IS SUFFICIENT FOR CONVICTION, IS OF EXTRAORDINARY IMPORTANCE IN THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE, INASMUCH AS THE ISSUE CONCERNS WHETHER A CRIMINAL DEFENDANT MAY BE CONVICTED OF A CONSPIRACY WHEN A JURY HAS NOT FOUND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT HAS CONSPIRED TO COMMIT "ANY OFFENSE AGAINST THE UNITED STATES".

(a) If this question is not resolved, the public's confidence in the Federal criminal justice system will be seriously jeopardized.

The question involved here simply is whether a federal criminal defendant may be convicted of a conspiracy charge,

when the jury has not found beyond a reasonable doubt that he has conspired to commit a valid "offense against the United States" as required under 18 U.S.C. Section 371.

If, as in petitioner's case, a criminal defendant is accused of a conspiracy with two objectives, and the District Court charges that a finding of guilt upon one objective is sufficient for a conviction, if one objective is subsequently found not to be an offense, then to permit the conviction to stand is for the federal Courts to endorse a criminal conviction for conspiracy when the defendant has not been found guilty beyond a reasonable doubt of a conspiracy to commit "any offense against the United States". This is because there can be no way that a federal Court can determine whether the defendant was convicted upon the valid objective—particularly when the jury has been told they may convict the defendant solely upon the invalid objective. The fact that a federal Court of Appeals is making a guess as to what the jury did—doesn't make their guess any more accurate. The federal Courts should not be in the business of guessing, nor should our justice be subject to the whim of chance. The Courts of Appeals' gamble for the defendant is a bet he ought not to be forced to play, particularly when life, liberty and property are the stakes. It is Russian roulette justice, and the Supreme Court, to protect the integrity of federal criminal proceedings, is duty bound to prevent it. It is basic to the law and interwoven into the very fabric of our nation's integrity, that no matter how reprehensible the sin of any man, nor great the evidence against him, he may never be convicted for an act which is not a crime. At petitioner's trial, where the conspiracy charge had two objectives, one not an offense, his chance of conviction for an action not a crime was at least 50-50. In affirming his conviction, the Court of Appeals' judgment was no better than a flip of the coin. This is not what the public has come to expect.

Further the odds that petitioner was found guilty on the objective which did not state an offense exceeds 50%, when it's considered that the invalid objective was listed first in the conspiracy Count and that the only remaining objective was the bizarre, novel and conceptually incomprehensible *conspiracy to attempt* charge.

3. THE AFFIRMANCE OF PETITIONER'S CONSPIRACY CONVICTION UNDER THE MINORITY RULE FOLLOWED BY THE SECOND CIRCUIT, IS CONTRARY TO THE SUPREME COURT'S DECISION IN *STROMBERG V. STATE OF CALIFORNIA.*

In *Stromberg, supra,* at 368, 51 S.Ct., at 535, the Supreme Court reversed a general verdict of guilty rendered on a single Count which charged three crimes, pursuant to one statute, where one of the crimes was held unconstitutional, and the jury had been charged that guilt as to any one crime was sufficient to convict. The Court stated its logical rationale:

> The verdict against the defendant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. *Ibid.*

Stromberg is almost identical to our situation—in both *Stromberg* and the Question Presented there is a general verdict of guilty under a single Count alleging multiple charges, the jury is instructed that a conviction may rest upon any charge, and one objective or crime fails to state a valid offense against the sovereign. The distinction is solely in the fact that instead of a multi-objective conspiracy, in *Stromberg*, the Count in question charged several violations under one state statute. The Supreme Court's rationale and reversal in *Stromberg* must be considered controlling. The 7th and 9th Circuits agree, and hold that *Stromberg* "compel[s]" a reversal where one objective of a multi-objective conspiracy Count fails to state an offense, and when the jury was charged that a conviction need only rest upon one of the conspiratorial objectives. *Carman, supra,* at 566. See also *Baranski, supra,* 560-561. The minority rule followed by the 2nd, 6th and 8th Circuits, which uphold the conviction although one objective fails to state an offense, is clearly contrary to the near "all fours" decision in *Stromberg*, and must be considered in conflict not just with the Supreme Court's principle but decision.

4. THE RATIONALE FOR THE SECOND CIRCUIT'S MINORITY RULE IS CONTRARY TO OVERWHELMING AND UNEQUIVOCAL SUPREME COURT PRECEDENT.

Compare the clear logic of *Stromberg*, which is the touchstone for the majority rule, with the rationale for the minority rule, as evidenced in the Second Circuit's decision in *United States v. Dixon, supra*, at 1402. In *Dixon*, although one objective failed to state an offense, the Court found the remaining conspiratorial objective sufficient to support a conviction, because the defendant had also been convicted upon the substantive Count. *Dixon*, recognizing the split in authority, stated the concern of the rule, yet failed to dispel it:

> Although the Seventh Circuit, speaking through Judge Pell, has recently questioned the correctness of this line of authority on the ground that a reviewing court cannot tell what offense or offenses alleged in a conspiracy indictment were found by a jury, *United States v. Baranski*, 484 F.2d 556, 559-61 (1973), *here we know from the conviction on Count II that the jury found that Dixon has committed the offense validly charged in the conspiracy count.* (Citations omitted) (emphasis ours). *Ibid.*

Of course, the Second Circuit had no way of knowing any such thing. The 3rd Circuit in *Dansker* rejected just such an argument by the Government; and its admonition is equally applicable here:

> The government's position ignores the fact that the crime of conspiracy is separate and distinct from the related substantive offense. It requires proof of the additional element of an agreement between alleged co-conspirators. (citations omitted). Hence, it is neither illogical or impossible for a jury to find an alleged conspiracy agreement nonexistent while, at the same time convicting the defendants of the substantive offense charged. *Id.*, at 51.

When the Court of Appeals assumes that a conspiracy to commit the valid objective in question was found by the jury, based upon the conviction on the substantive charge, the Court then truly does become both judge and jury. The minority's rationale for permitting a multi-objective conspiracy to stand under these circumstances is contrary to the clear and unwavering decisions of the Supreme Court that a substantive offense and conspiracy to commit it are "separate and distinct offenses". *Pinkerton v. United States*, 328 U.S. 640, 643, 66 S.Ct. 1180, 1182, 90 L.Ed. 1489 (1946), *rehearing denied*, 329 U.S. 818, 67 S.Ct. 26, 91 L.Ed. 697 (1946); *American Tobacco Co. v. United States*, 328 U.S. 781, 789, 66 S.Ct. 1125, 1129, 90 L.Ed. 1575 (1946); *Callanan v. United States*, 364 U.S. 587, 593, 81 S.Ct. 321, 325, 5 L.Ed. 2d 312 (1961), *rehearing denied*, 365 U.S. 825, 81 S.Ct. 687, 5 L.Ed. 2d 703 (1961); *Iannelli v. United States*, 420 U.S. 770, 777, 95 S.Ct. 1284, 1289, 43 L.Ed. 2d 616 (1975).

Therefore, not only is the minority Circuits' rule contrary to *Stromberg*, but the rationale for its rule is contrary to the well-established and long-standing precedent of the Supreme Court.

5. THE SECOND CIRCUIT'S MINORITY RULE IS CONTRARY TO THE SUPREME COURT'S PRINCIPLE OF LENITY.

The minority rule is not only contrary to all principles of fairness, and the basic safeguard of liberty that no man shall be convicted of an offense against the United States unless a jury so finds beyond a reasonable doubt, but is contrary to the Supreme Court's rationale which is so aptly evidenced in the doctrine of lenity.

The doctrine of lenity requires that where there is doubt concerning the ambit of a criminal statute, it is to be strictly construed. *Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955); *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed. 2d 493 (1971); *United States v. Bass*, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed. 2d 488 (1971). The rationale is that no man shall be convicted except for the commission of an actual offense. Toward this end, the federal Courts will strictly construe the legislation of Congress. Con-

gress' intent to make conduct a crime must be "plain and unmistakenly" asserted. *United States v. Bass, supra,* at 348, 92 S.Ct. at 523, *quoting, United States v. Gradwell,* 243 U.S. 476, 485, 37 S.Ct. 407, 411, 67 L.Ed. 857 (1917).

It seems that if the Supreme Court cherishes the principle that no man may stand convicted for conduct unless it be "unmistakenly" a crime to the extent of strictly construing the legislation of Congress in doubtful cases—then if the odds are no better than 50-50 that a defendant has been convicted of a crime, because one objective of a two-objective conspiracy is invalid, can his conviction be justified, particularly when no legislation of a coordinate branch of Government need be strictly construed? The Second Circuit's rationale that a conviction on the substantive Count so assures conviction upon the conspiracy Count that it is of no concern whether the jury even considered the valid conspiratorial objective, never mind found guilt beyond a reasonable doubt, is hardly consistent with the concerns that gave birth to this Court's doctrine of lenity. Yet this is the very standard that currently exists in the Second Circuit.

If Congress' intent as to what conduct is criminal must be free from ambiguity—so must be the jury's verdict that the conviction rests from a valid offense.

No jury may find guilt beyond a reasonbable doubt, when the Courts cannot know beyond a reasonable doubt that the jury's deliberation was upon a valid offense. In petitioner's case, and in all these cases, however, there is no ambiguity, for there is no doubt. The Courts don't know. Such justice by lot ought to be ended.

6. THE AFFIRMANCE OF PETITIONER'S CONVICTION ON A MULTI-OBJECTIVE CONSPIRACY CHARGE WHERE ONE OBJECTIVE WAS FOUND NOT TO STATE AN OFFENSE, IN LIGHT OF THE DISTRICT COURT'S INSTRUCTION THAT GUILT NEED ONLY BE FOUND AS TO ONE OBJECTIVE, IS EGREGIOUS ERROR OF SUFFICIENT IMPORTANCE TO REQUIRE THE SUPREME COURT TO EXERCISE ITS SUPERVISORY POWERS TO CORRECT.

The conspiracy charge against petitioner consisted of only two objectives. The first was found by the Court of Appeals to not state an offense. Due to the District Court's jury charge petitioner could have simply been convicted of a conspiracy to engage in the invalid objective, without the jury ever having considered the second one.

The chances are excellent the jury obeyed the judge's instructions and that petitioner was not found beyond a reasonable doubt to have conspired to commit "an offense against the United States", as is required by 18 U.S.C. Section 371. Such a prospect is alone unacceptable and requires the Court to clear this constitutional cloud that hangs over petitioner's conviction.

But it goes further. The objective found invalid by the Court of Appeals is the first objective alleged in the conspiracy Count. In addition, the remaining objective was the novel crime of *conspiracy to attempt* to export without an export license. Inasmuch as the District Court refused to explain to the jury in its charge exactly what is a *conspiracy to attempt* to export without an export license and over petitioner's objection (A-2405-2406), the jury could have no understanding of the charge. Particularly when the jury during deliberations sent the Court a note that "there is some confusion as to the legal definition of attempt as indicated in Count II of the indictment" (Attached Appendix, 29a). If there was confusion on the substantive offense of attempt in Count II, how could the jury have possibly understood *conspiracy to attempt* under Count III, especially when the Court refused to define the elements of the charge of *conspiracy to attempt* and over petitioner's objection (A-2405-2406). See petitioner's Motion For New Trial in attached Appendix, 20a.

The Court should remember that petitioner had no dealer's license, and could offer no defense as to the substantive dealing charge under Count I, since the Court properly charged that scienter is not an element of the offense. Petitioner freely admitted that he and his companions intended to export the 110 firearms. After all, he is a lawfully registered exporter of these firearms with the Department of State, had paid a $500 fee for 5 years, and as such by statutory definition under 22 U.S.C.

Section 2778 (b)(1) and 22 C.F.R. Section 122.01 was lawfully "engaging in the business of exporting". When the District Court charged that one who is "engaging in the business of exporting" is a dealer required to secure a dealer's license under 18 U.S.C. Section 922 (a)(1) as one "engaging in the business of dealing", the petitioner was guilty as to the dealing charge. Petitioner's claim he is a lawfully registered exporter was an admission under the judge's charge that he was dealing without a dealer's license and since no scienter is required for dealing, he was unable to defend against the dealing charge by stating he believed that being lawfully registered with the Department of State as one "engaging in the business of exporting", and eventually receiving an export license, was all that was required to export firearms.

Petitioner's argument that a lawfully registered exporter who is "engaging in the business of exporting" firearms need not secure a dealer's license was a claim counsel could only make to the District Court. The subsequent reversal on the substantive dealing charge does not correct the injustice. After all, when the jury considered the conspiracy charge, and reached the first objective—conspiracy to deal—there can be no real doubt that the jury never felt compelled to grapple with the absurd *conspiracy to attempt* to export without an export license.

Therefore, not only is there a chance that the jury convicted petitioner on the invalid objective, and therefore was never found guilty beyond a reasonable doubt to have conspired to commit "an offense against the United States" under 18 U.S.C. Section 371, but logic dictates that it is a certainty that this is exactly what happened.

At petitioner's trial the issue of an illegal agreement was hotly contested, and was raised on appeal. Of the three alleged co-conspirators, two were foreign nationals legally in the United States who *undisputedly* spoke and understood no English (A-316, A-1284, A-1561, A-1480, A-1485, A-1489, A-1506). Petitioner is a lawfully registered exporter with the Department of State of the firearms in question, and the claim was that all the parties knew this, and for this reason petitioner was involved so that a small number of firearms might lawfully be exported.

None of the alleged co-conspirators testisfied at trial. Based upon these facts, it can hardly be said that the jury's failure to consider a lawful objective of the conspircy is a nitpicking technicality. This petition has been filed because this is the exact treatment this error has received to date.

Petitioner's conviction poses a direct threat to the requirement that he be found guilty beyond a reasonable doubt of a conspiracy to commit "an offense against the United States". 18 U.S.C. Section 371. It is contrary to the majority rule of the federal Circuits and the Supreme Court's decision in *Stromberg*. The rationale adopted by the Second Circuit's minority rule that conviction upon the substantive Count *assures* the Court that the jury convicted on the valid conspiratorial objective to commit that substantive offense is contrary to the overwhelming Supreme Court precedent which have held the substantive offense and conspiracy charge to be "separate and distinct offenses" due to the additional element of the agreement. Conviction by convenience should not be the standard of legal review of such a serious and fundamental defect in the administration of criminal justice. This defect amounts to a deprivation, and as such the Supreme Court must correct this divergence from the requirements of a constitutional conviction by the exercise of its supervisory powers.

II

7. CONGRESS NEVER INTENDED TO CREATE THE OFFENSE OF CONSPIRACY TO ATTEMPT, AND FOR THE FEDERAL COURTS TO HOLD OTHERWISE IS TO LEGISLATE AN ABSURD JUDICIAL OFFENSE WHICH IS CONTRARY TO THE PURPOSE AND FUNCTION OF BOTH THE CONSPIRACY AND ATTEMPT DOCTRINES, AND AS SUCH RAISES AN IMPORTANT QUESTION CONCERNING THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE AND THE INTERPRETATION OF AN IMPORTANT FEDERAL CRIMINAL STATUTE WHICH THIS COURT PURSUANT TO ITS SUPERVISORY POWERS MUST RESOLVE.

Petitioner is the first person in any reported decision to be convicted of a *conspiracy to attempt* to export firearms without an export license. Prior to petitioner's case, only two federal decisions have even considered this bizarre issue of *conspiracy to attempt*, and each came to different decisions. *United States v. Clay*, 495 F.2d 700 (7th Cir. 1974), *cert. denied*, 419 U.S. 937, 95 S. Ct. 207, 42 L. Ed. 2d 164 (1974) (court holds conspiracy to attempt a federal offense); *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980) (court holds conspiracy to attempt not a federal offense).

The remaining object of the conspiracy charge in petitioner's case is the novel *conspirary to attempt* to export firearms without a license. (15a). It should be noted at the outset that the Government claims that the *conspiracy to attempt* charge was not bad draftsmanship but "the *only* appropriate charge" (emphasis ours) (A-2006). This remained their position on appeal to the 2d Circuit. (Government's brief before the Court of Appeals, pp. 22-23). The 2d Circuit in its opinion held that Congress did intend to create as an offense a *conspirary to attempt*. *United States v. Mowad, supra*, at 1074-1075.

To uphold such a charge as an offense intended by Congress is an irrational conclusion under either the law or logic. Further, to saddle Congress with such poor judgment is unfair. Congress would have never intended such an absurd offense. The simplest and quickest way to unequivocally prove this is by one question—why would Congress provide for a *conspiracy to attempt* to export without a license, 18 U.S.C. Section 371 and 22 C.F.R. Section 127.01, when conspiracy to export is itself an offense, 18 U.S.C. Section 371 and 22 U.S.C. Section 2778? Neither the District Court or the Court of Appeals would answer or explain. For the defendant, or at least the jury, to be told what the charge means is not totally unreasonable. Incredibly, neither were ever informed. Although the District Court and Court of Appeals both ruled that a *conspiracy to attempt* to export

without a license was a separate offense, no one has been willing to say exactly what it is. In fact, petitioner asked the District Court, how she could charge the jury on a *conspiracy to attempt*. The Court's response: "very carefully" (A-2252). Unfortunately, the Court was too careful, since she never charged the jury on the elements of a *conspiracy to attempt* to export without a license, or told the jury just exactly what the charge meant, despite petitioner's request that the Court do so (A-2405-2406). See the District Court's conspiracy charge in the attached Appendix, 21a. See also Motion for New Trial, 20a, and Motion For Arrest of Judgment, 19a. Petitioner's position was that if the jury wasn't told what the charge meant, the jury could not properly evaluate the case.

The petitioner has been convicted of a *conspiracy to attempt*, and in the over two years since petitioner's indictment, through the District Court and the Court of Appeals, petitioner still doesn't know what the charge actually means. In all candor, petitioner believes that neither the District Court or Court of Appeals are sure either.

If there is such a separate crime as a *conspiracy to attempt*—which according to the Government was in petitioner's case "the only appropriate charge" (A-2006)—then the jury must be charged that the conduct required is an "overt act" toward a "substantial step". Such is the conduct required, respectively, for a conspiracy under 18 U.S.C. Section 371, and attempt under the case law. *United States v. Stallworth*, *supra*, at 1040; *United States v. Jackson*, 560 F.2d 112, 117-120 (2d Cir. 1977), *cert. denied*, 434 U.S. 941, 98 S.Ct. 434, 54 L. Ed. 2d 301 (1978); *United States v. Manley*, 632 F.2d 978, 987 (2d Cir. 1980); *United States v. Mandujano*, 499 F.2d 370, 376-377 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114, 95 S.Ct. 792, 42 L.Ed. 2d 812 (1975); *United States v. Oviedo*, 525 F.2d 881, 885-886 (5th Cir. 1976); *United States v. Alvarez*, 610 F.2d 1250, 1254, n.3 (5th Cir. 1980). See Model Penal Code, Section 5.01 (1)(c) (Proposed Official Draft 1962).

Could any jury ever be able to make such a finding? Would Congress want them to? Yet this is the law if the offense of

conspiracy to attempt exists. This problem was presented to the District Court and Court of Appeals. The problem was resolved by not charging the jury as to the elements of the offense, and ignoring the issue. In effect proceeding "very carefully". For a felony charge where the conspiracy to attempt was "the only appropriate charge", this is too carefully.

The Supreme Court has recognized that the law of conspiracy serves two purposes: 1) to punish concerted criminal activity and 2) to punish conduct which is at "some point in the continuum between preparation and consummation, the likelihood of a commission of an act is sufficiently well formed to justify the intervention of the criminal law". *United States v. Feola*, 420 U.S. 671, 693-694, 95 S. Ct. 1255, 1268, 43 L. Ed. 2d 541 (1975). This is also the rationale for an attempt. Both conspiracy and attempt are inchoate offenses—both are aimed at criminalizing anticipatory conduct sufficiently near to the substantive harm to justify the intervention of society. Conspiracy and attempt are not aimed at each other, but the completed offenses. Congress' concern is not anticipatory conduct to commit anticipatory conduct.

The "likelihood of the commission of the act" discussed in *Feola*, is not the attempt, but the substantive offense. To combine conspiracy and attempt is to distort their purpose—to punish the danger of the completion of the substantive harm.

Congress no more intended to create a Section 371 *conspiracy to attempt* to export firearms without a license under 22 C.F.R. Section 127.01, than it intended to create a Section 371 *conspiracy to conspire* to distribute a controlled substance under 21 U.S.C. Section 846 or a *conspiracy to conspire* to import a controlled substance under 21 U.S.C. Section 963, since Section 846 and Section 963 provide for individual conspiratorial offenses. One charge is just as logical or illogical as the other.

When Congress passed the general conspiracy statute, it did not have in mind a federal regulation which would later be promulgated by the Secretary of State criminalizing an attempt to export without a license.

(a) Since failure to consummate the crime is a traditional element of an attempt, a conspiracy to attempt is an agreement to fail to commit the object of the attempt, and as such is not an unlawful agreement to commit an "offense against the United States" as required by 18 U.S. C. Section 371.

The traditional elements of attempt are 1) intent to commit the substantive offense, 2) conduct in furtherance of the intention and 3) a failure to consummate the crime. *United States v. Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976). The essence of a conspiracy is an agreement to commit an unlawful act. *Iannelli v. United States, supra* at 777. Therefore to *conspire to attempt* requires proof of an unlawful agreement to fail to commit the substantive offense. Obviously, a conspiracy to attempt is not an unlawful agreement, since an agreement to attempt—to fail—is an agreement to not commit the substantive offense. This defeats the requirement that a conspiracy must be an unlawful agreement under 18 U.S.C. Section 371 to commit an "offense against the United States".

Such is the difficulty when a conspiracy to attempt is made an offense by the Courts, rather than the legislature.

As stated in *United States v. Meacham, supra*, at 509, n.7: "it would be the height of absurdity to conspire to attempt, an inchoate offense, and simultaneously fail at the effort".

For the Second Circuit to have found a *conspiracy to attempt* to state an offense is to create an offense under 18 U.S.C. Section 371 which is contrary to the nature of the conspiracy and attempt doctrines as well as the law and logic and intent of Congress. There is little point to create an offense the elements of which cannot be intelligently explained to a jury, the purpose of which is a complete mystery, and which adds simply nothing but confusion and doubt to the criminal law with no recognized gain. To convict a criminal defendant of inchoate conduct to commit inchoate conduct is a result which must be justified before permitted. The roots of "conspiracy" and "attempt" are too deep, their role too historic, their importance to a free and orderly society too great, to be so artificially twisted to create an

offense of the moment, which contradicts their tradition and alters their character.

The Second Circuit's interpretation of 18 U.S.C. Section 371 poses such a threat to the accepted and well-defined purpose and function of the inchoate offense, as to pose an exceptionally important question, and that Second Circuit's decision amounts to such a departure from the law that it is imperative that the supervisory powers of the Supreme Court be exercised so that criminal defendants may not be convicted of conduct clearly not an offense.

III

8. A DEFENDANT MAY NOT BE CONVICTED OF A FEDERAL CRIMINAL ATTEMPT IF IT IS UNKNOWN EXACTLY WHEN, WHERE OR HOW THE ALLEGED SUBSTANTIVE OFFENSE WILL OCCUR.

(a) The Court of Appeals' decision has removed the elements of time and distance from the federal attempt doctrine, which if permitted to stand, will so broaden the attempt doctrine that a determination as to when the imperceptible boundary of attempt is crossed will be subject to constitutional claims of void for vagueness and double jeopardy under the Fifth Amendment to the United States Constitution.

The extraordinary nature of this issue is that the Court of Appeals has removed the elements of time and distance fom the attempt doctrine. No federal criminal attempt case has ever taken the position that where, when and how the substantive offense would occur were unnecessary for a conviction. The result is that the historical character of the attempt concept has been revolutionized. The Supreme Court must be concerned due to the degree of the departure from the time-settled law and immense impact such a departure may have upon subsequent federal criminal attempt litigation, specifically the emergence of two extraordinarily dangerous results:

1) that a conviction may be sustained for a federal criminal attempt without sufficient conduct and without any reasonable assurance that a man with the intent to break the law,

plans to actually do so at a time, at a place and in a manner sufficiently corroborative of the criminal intent that society feels compelled to intervene; the very function of the conduct element of an attempt; and

2) that as a result of the removal of the parameters of knowing exactly where the substantive crime will be committed, when it will be committed, or how it will be committed, the federal attempt doctine will be so broad that it will be impossible for a determination to be made as to when the imperceptible boundary of attempt—the "substantial step"—is crossed, thereby raising claims of void for vagueness and double jeopardy under the Fifth Amendment to the United States Constitution.

These dangers are particularly so when the substantive offense must be committed at a specified place, as here, a port of export. This Court has defined exportation as "a severance of goods from the mass of things belonging to this country, with an intention of uniting them to a mass of things belonging to some foreign country". *Swan and Finch Company v. United States*, 190 U.S. 143, 145, 23 S.Ct. 702, 703, 47 L.Ed. 984 (1902). Therefore, before an exportation may occur, there must be a crossing of a boundary at a port—if the port is unknown, the time of the crossing unknown and the manner of crossing unknown, there is hardly an attempt to sever goods "from the mass of things belonging to this country".

Petitioner's conviction for attempt to export in this case is a complete miscarriage of justice and a perversion of the attempt doctrine. It should be clear that it is no offense to attempt to export firearms, rather the offense is an attempt to export firearms *without a license*. There is no doubt petitioner wanted to export firearms. He freely and openly made that declaration to the Department of State by paying $500 for a lawful 5-year registration as an exporter of firearms, that is one who is lawfully "engaging in the business of exporting firearms", 22 U.S.C. Section 2778(b)(1), 22 C.F.R. Section 122.01 (Government Exhibits 10 and 11, A-2684-2697). As a registered exporter, and according to the testimony of the Government's own witness,

the Director of the Office of Munitions Control in the Department of State, every registered exporter such as petitioner receives in the mail the export applications which must be submitted after the terms of a proposed exportation are sufficiently established so that the registered exporter may provide information required on the application for an export license. (A-487, A-529). See 22 C.F.R. Section 123.01. The eighteen export applications received by petitioner, and at his home, were offered into evidence (A-2090-2091, A-2766-2773).

Petitioner negotiated the purchase of 110 handguns from two federally licensed firearms dealers in Connecticut, The Sportsman's Rendezvous in the town of Milford and the Yankee Gun Shop in the town of Orange. The negotiations were conducted at the dealers' places of business during business hours. The purpose of the purchase of the firearms was their eventual export to Lebanon. The day of the arrest of petitioner, April 6, 1979, he and his three companions arrived at the Yankee Gun Shop in Orange to pick up the handguns and pay for their purchase "right around noon" (A-1730-1731). The gun shop is right on a major thoroughfare in Orange, known as the Post Road, Route I. Petitioner and his three companions arrived at noon in two cars, with two huge packing crates several feet long (*See video tape*, Government's Exhibit 8; *crates*, Government Exhibits 14 and 15). One crate according to a Government agent was clearly visible from the rear window (A-1891). Upon arrival at the gun shop, the dealer, a Government informant, tells petitioner that the weapons are at a warehouse in New Haven. Petitioner, his three companions, and the two dealers, both Government informants, take two cars to the warehouse—petitioner's car, and a dealer's car (A-1877-1878). Petitioner and his companions leave their other car at the Yankee Gun Shop (A-1877-1878, A-1852, A-2082-2084, A-2088). The Court should know that both of these cars were subsequently seized—petitioner's car at the warehouse in New Haven, his companion's car at the Yankee Gun Shop—and forfeiture proceedings instituted.

Upon arrival at the warehouse, petitioner and his three companions slowly pack the handguns in the two crates (Government Exhibit 8). Each of the handguns were in individual gun

boxes. The only packing material used were empty Colt boxes—clearly marked "Colt" emblazoned with the Colt logo (Government Exhibit 28). The crates were then tightly nailed shut (Government Exhibit 8, A-1511). The crates were dragged, due to their extreme weight, toward the warehouse bays (Government Exhibit 8), when the petitioner and his three companions were arrested.

No one resisted arrest. Nor were any one of the four armed. Both crates were unmarked, (Government Exhibits 14 and 15), and no evidence was introduced that any of the four had either labels or any marking instruments of any kind in their possession, nor did the seizure of petitioner's car at the warehouse, or their other car back at the Yankee Gun Shop result in the discovery of any such evidence. There is not a single shred, nor an iota of deception or subterfuge throughout the negotiations, receipt of the handguns, or the packing of the handguns.

The contention of the Government was that four adult men were to pile into one car, a Buick, (A-1877-1878), with two huge unmarked crates several feet long, so heavy that they had to be dragged toward the bays, with one crate visible from the rear window, and in broad daylight head to some unknown port of exit with no marking materials of any kind in anyone's possession, and no tools to open the nailed crates, for immediate export to Lebanon—*while leaving their other car back at the Yankee Gun Shop.*

This case has made a mockery of the attempt doctrine, and of justice. The fact that petitioner, a lawfully registered exporter, is in jail for such an "attempt" is not a shining hour for legal reason . . . or review.

At oral argument before the Court of Appeals, despite comprehensive briefs, and petitioner's oral argument in the few minutes permitted, Judge Waterman, who wrote the opinion below, still stated that "the crates were marked for Lebanon". Although this devastating error was called to the Court's attention in petitioner's Petition For Rehearing, the fact that the crates were never marked and no party had any such materials, was never even acknowledged by the Court in its opinion. No

doubt it is part of every lawyer's fact to suffer defeat and rejection in the Courts—what's difficult to accept is the prospect that you were never heard.

Petitioner claimed that he was to return to the Yankee Gun Shop, where of course, he and his companions left their car, complete the paper work for the firearms, return to Waterbury with the weapons, complete his export application and submit it to the State Department. He never had the chance.

The Government justified their extraordinary arrest at the warehouse, after luring petitioner and his companions there and away from the gun shop, because if they had not arrested them then, the firearms would have been "lost in traffic". (Government's brief before Court of Appeals, p. 26).

For an attempt, a two-tier test has been uniformly adopted by the federal Courts. First, the defendant must have the requisite criminal intent, and secondly, the defendant must have engaged in conduct sufficient to independently corroborate the alleged criminal intent. See *United States v. Mandujano, supra,* at 373-377; *United States v. Oviedo, supra,* at 885; *United States v. Stallworth, supra,* at 1040; *United States v. Jackson, supra,* at 117-120; *United States v. Manley, supra,* at 987. In the federal courts, this is most often termed a "substantial step". *United States v. Mandujano, supra,* at 376-377; *United States v. Stallworth, supra,* at 1040. The mere intent to attempt the crime, no matter how strong, is not sufficient, without the corroborating conduct. *United States v. Monholland,* 607 F.2d 1311, 1318 (10th Cir. 1979), *United States v. Manley, supra,* at 988.

The "substantial step" standard is the Model Penal Code's definition of attempt, Section 5.01, which has been followed by the Second Circuit prior to petitioner's case in its last three attempt decisions, *Stallworth, Jackson* and *Manley.* Under the Model Penal Code, which is the most liberal standard of attempt, the failure of proof as to the place of the commission of the crime, and the time of its commission requires an acquittal. The Code lists eight examples of when the conduct is sufficiently corroborative of the criminal intent to amount to a "substantial step". The one dispositive of our matter is:

> (f) possession, collection, or fabrication of materials to be employed in the commission of the crime, *at or near the place contemplated for its commission*, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances. (emphasis ours). Model Penal Code, Section 5.02 (2)(f).

How can we tell if the collection of the firearms was "at or near the place contemplated for the commission" of the illegal export, if it's unknown at what port the offense was to occur? Further, how can we determine the "possession" serves "no lawful purpose under the circumstances", when petitioner, a registered exporter of this very category of firearms with the Department of State, was not at or near an identifiable port of export and by the Government's own testimony was sent export applications to obtain the proper license?

The Model Penal Code in its Comment states:

> Here a finding that a substantial step has been taken should be permissible if the actor has arrived at the scene of the contemplated crime with materials in his possession which under the circumstances serve no lawful purpose of the actor. This would encompass in the usual case, the would-be murderer carrying a lethal weapon or an intended burglar in possession of a ladder. The substantiality of the step taken in this situation is demonstrated by the nature of the materials and the proximity to the scene of the contemplated crime, which in *combination* shows a firm criminal purpose (emphasis theirs). Model Penal Code, Section 5.01, Comment at 61 (Proposed Official Draft 1962).

The Model Penal Code—the standard adopted by the Second Circuit—states that it is the *combination* (emphasis theirs) of the nature of the materials possessed and the proximity of the scene of the contemplated crime which is required for substantial conduct. There can be no proximity to a scene which is unknown. When we consider that petitioner paid $500 and is

lawfully registered with the Department of State as "engaging in the business of exporting" this exact category of firearms, the injustice in this case and deviation from the law can be clearly seen. The Second Circuit never even mentioned the Model Penal Code in petitioner's case, although it dominated each of its last attempt decisions—*Stallworth, Jackson* and *Manley.*

There has never been a reported federal attempt case when the exact place, time and manner as to how the substantive offense would occur was completely unknown. In fact, in every reported decision in which an attempt to export firearms or military equipment under 22 U.S.C. Section 2778 and 22 C.F.R. Section 127.01 has occurred, there was an arrest at an identifiable place of export. *United States v. Swarovski*, 557 F.2d 40 (2d Cir. 1977), *cert. denied*, 434 U.S. 1045, 98 S.Ct. 889, 54 L.Ed. 2d 796 (1978); *United States v. Gurrola-Garcia*, 547 F.2d 1075, 1076 (9th Cir. 1976); *United States v. Lizarraga-Lizarraga, 541 F.2d 826, 827 (9th Cir. 1976); Samora v. United States*, 406 F.2d 1095, 1096 (5th Cir. 1969). All of the prior Second Circuit decisions considering the sufficiency of an attempt involved arrests at the scene where the alleged substantive offense would occur, with the time and manner evident. *United States v. Coplon*, 185 F.2d 629, 633 (2d Cir. 1950), *cert. denied*, 324 U.S. 920, 72 S.Ct. 362, 96 L.Ed. 688 (1952) (defendant about to pass to foreign national classified documents at night on New York street); *United States v. Stallworth, supra and United States v. Jackson, supra* (attempted bank robberies, defendants at bank, with firearms and robbery paraphernalia); *United States v. Manley, supra* (attempted possession of narcotics with intent to distribute, defendant weighing the cocaine on a scale). Could the defendants in *Stallworth* and *Jackson* been convicted of attempted bank robbery if it were unknown what bank they were to rob, when and how they would rob it? May a criminal defendant be convicted of a federal criminal attempt to rob some bank, some place, some time, some how? Petitioner's situation is more absurd—since he is registered to export the very category of handguns he purchased. No defendant can interpose such a defense for an attempted bank robbery.

Even assuming an intent to illegally export, what if the handguns were flown from New York to Chicago, and stored in a warehouse, to be later flown out of the United States? The substantive offense is to "sever" these firearms from the U.S. without a license. *Swan and Finch Company v. United States, supra*, at 145, 23 S. Ct., at 703. Can an attempt be a month in duration? Three weeks? A week? A day? How can a Court decide this issue when it doesn't know where, when or how the substantive offense would occur?

Petitioner's conviction is a complete disregard for the law and a dramatic abuse of the attempt doctrine. Under such circumstances how can a criminal defendant know what is an attempt and what is not? How could a defendant assert a subsequent claim of Double Jeopardy when the place, time and manner of his first conviction was unknown? Of course, he cannot.

The limitation of time and distance is imbedded in the character of attempt, and serves to protect the integrity of the attempt doctrine, as much as that doctrine protects the public. By failing to recognize this limitation, the Court of Appeals' decision serves neither interest. The Court's decision is a distortion of the attempt doctrine which so radically changes its historic character as to require the intervention of the Supreme Court to correct what is completely unjustified and unfounded departure from the law, in a manner that places the application of a well-settled offense into a constitutional quandry where issues of notice and fairness will by necessity be raised.

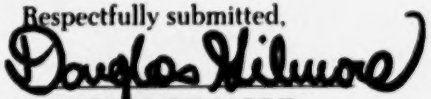
The truth is, the Government doesn't know now and didn't know then, the when, where or if the firearms would ever be exported, whether it would be legally or not. Their reasons for the arrest, rather than justifying their action, pose grave questions concerning their belief that these firearms were headed anywhere, except back to the Yankee Gun Shop, where petitioner and his companions left their car. By arresting petitioner and prohibiting him to return to the Yankee Gun Shop, the Government denied him the opportunity to establish whether his $500 registration fee to the Department of State was a donation, or declaration.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Second Circuit and that the Court summarily reverse the judgment of the Court of Appeals or set the case down for oral argument or such other consideration as the Court deems appropriate.

Dated: June 25, 1981

Respectfully submitted,



DOUGLAS GILMORE
11 Harding Lane
Westport, Connecticut 06880
(203) 226-6277
Attorney for Petitioner,
Antoine Mowad

APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ANTOINE MOWAD

Appellant.

No. 460,
Docket 80-1197.

Harold James Pickerstein, Chief Asst. U.S. Atty., Richard Blumenthal, U.S. Atty., D. Connecticut, Thomas S. Luby, Asst. U.S. Atty., Bridgeport, Conn., Daiga Osis, Law Student Intern, on brief, for appellee.

Douglas Gilmore, Westport, Conn., Raymond W. Ganim, Stratford, Conn., for appellant.

Before WATERMAN, MANSFIELD and VAN GRAAFEILAND, Circuit Judges.

WATERMAN, Circuit Judge:

Defendant Antoine Mowad appeals from a judgment of conviction entered on May 12, 1980 in the United States District Court for the District of Co ecticut (Ellen Burns, Judge) after a jury trial resulting in verdicts of guilty on April 7, 1980. Mowad was convicted of dealing in firearms without a license, in violation of 18 U.S.C. § 922(a)(1), of attempting to export firearms without an export license, in violation of 22 U.S.C. § 2778(c) and 22 C.F.R. §§ 123.01 and 127.03, and of conspiracy to commit the two foregoing offenses in violation of 18 U.S.C. § 371. Mowad was sentenced to two years imprisonment on each of Counts One ("illegal dealing") and Two ("attempted illegal export"), the sentences to run concurrently, and to a five year term of probation on Count Three ("conspiracy"), to run consecutively to the sentences imposed on Counts One and Two.

On this appeal, Mowad raises a variety of challenges to the propriety of his conviction. First, he contends that the evidence adduced at trial was insufficient to provide support for the jury's

verdict of guilty on each of the three charged violations of law. He also challenges the legal sufficiency of Count One of the indictment, and Count Three as well, for he maintains that he was a lawfully registered exporter of firearms at the time of his alleged violation of 18 U.S.C. § 922(a)(1) and therefore the trial court committed clear error by construing that statute so that he could be considered to be an unlicensed "dealer" in firearms.

[1] For the reasons set forth below, we find no material error in the district court's rulings and the jury's verdict with reference to the attempted illegal export and conspiracy charges, and accordingly we affirm Mowad's conviction of these offenses. However, we conclude that the charge, Count 1, for dealing in firearms without having a license to do so should not have been submitted to the jury, and so we reverse Mowad's conviction for this offense and remand the case to the district court with directions to dismiss the illegal dealing charge and to vacate the sentence imposed therefor.

This case was commenced as a result of an investigation conducted by agents of the Bureau of Alcohol, Tobacco and Firearms (AT&F). In early November, 1978, AT&F agents began an investigation upon receiving information from a confidential source that certain individuals from Waterbury, Connecticut (later determined to be defendant Mowad and several companions) were attempting to purchase from the Sportsman's Rendezvous, a licensed federal firearms dealer located in Milford, Connecticut, a large quantity of firearms which they wished to export to Lebanon. AT&F agents thereupon made contact with one Vince Ciulla, an employee of the Sportsman's Rendezvous, who confirmed the information the agents had received. Ciulla and a friend, Robert Berger, the owner of the Yankee Gun Shop, a nearby licensed federal firearms dealer, agreed to cooperate with the AT&F agents in the investigation.

With Ciulla's consent, AT&F agents set up electronic monitoring and recording equipment in the Sportsman's Rendezvous. During the period between November 3, 1978 and April 6, 1979, Mowad and various of his companions made numerous visits to

the Sportsman's Rendezvous and engaged in conversations with Ciulla, most of which were electronically recorded. During the course of these recorded conversations, a number of topics were discussed, including Mowad's desire to arrange a regular source of supply for periodic purchases of large quantities of firearms, "shop talk" concerning the prices and performance characteristics of various types of firearms, and preliminary negotiations arranged by Ciulla between Mowad and an undercover AT&F agent, posing as a private pilot, relating to the latter's proposal to smuggle a shipment of firearms, to be purchased by Mowad, out of the country.

Throughout the relevant period, Mowad repeatedly indicated to Ciulla his interest in acquiring large quantities of firearms for shipment to Lebanon, but the proposed deals frequently fell through, ostensibly because Mowad and his companions had been advised at various times by their contacts in Lebanon that passing a large shipment of firearms undetected through Lebanon customs would be too difficult.[1] Finally, however, Mowad and his companions apparently received word from their contacts in Lebanon that the difficulties with Lebanese customs had been removed, and, being advised by Berger of the continued availability of a supply of stolen firearms, they, following a series of late March 1979 visits to the Sportsman's Rendezvous, gave Ciulla a down payment of $3,000 and placed a definite order for an assortment of 110 handguns.

On April 6, 1979, Mowad and his companions arrived at the Yankee Gun Shop, where they met Ciulla and Berger. From there, the entire group proceeded to an abandoned warehouse building in New Haven, where the firearms were being stored. Mowad and his companions packed the weapons into two large wooden crates, which they had brought along for this purpose, using empty handgun boxes as filling material to balance out the load. After the weapons were crated, Berger was given $13,750

[1] During the months of February and March, 1979, Mowad and one of his companions, Sayid Kortobani, did purchase a total of 14 handguns from the Sportsman's Rendezvous, explaining to Ciulla that these guns were to be given as "gifts" to various officials in Lebanon to help ease the way through Lebanese customs for future shipments of firearms.

in cash, the remainder of the purchase price. Mowad and his companions then were arrested as they were removing the crates from the warehouse.[2]

Mowad was, as we have stated earlier, a lawfully registered exporter of firearms, and, at trial, his principal defense revolved around the contention that he, as such, had not engaged in any unlawful activity up to the time of his arrest. Mowad contended that he and his companions, had they not been arrested, would have transported the crated handguns to Mowad's home in Waterbury, Connecticut, and stored them there until Mowad could procure the necessary export license to ship the weapons legally to Lebanon.

On this appeal, Mowad, in attacking the validity of his conviction, continues to rely primarily upon his status as a lawfully registered exporter of firearms. With reference to the illegal dealing charge, Mowad maintains, as he did in the trial court below, that, absent a showing of some conduct inconsistent with a professed intent to export firearms, one who has lawfully registered as an exporter of firearms with the State Department under the Arms Export Control Act, 22 U.S.C. §§ 2751-2794, cannot as a matter of law be found to be a "dealer" under the Gun Control Act, 18 U.S.C. §§ 921-928.

In response, the Government does not contest Mowad's status as a legally registered exporter of firearms and does not challenge Mowad's assertion that the shipment of firearms in question was destined for export to Lebanon, and not for domestic sale. Rather, the Government maintains that the relevant statutory language[3] is literally applicable to Mowad's conduct. The Gov-

---

[2] After being advised of his rights, Mowad was questioned as to his role in the firearms transaction. At that time Mowad disavowed any knowledge of what his companions were up to, and stated that he was unaware that guns were involved until he arrived at the warehouse.

[3] 18 U.S.C. § 922(a)(1) provides:

(a) It shall be unlawful—

(1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce.

ernment reasons that Mowad, who is not a "licensed dealer" under the Gun Control Act, by his own admission intended to export firearms in his possession to Lebanon, conduct which logically is encompassed by the language "to engage in the business of . . . dealing in firearms . . . or in the course of such business to ship . . . any firearm . . . in interstate or foreign commerce," and thus is guilty of the charged statutory violation.

We agree with the Government's observation that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). However, we do not share the Government's belief that the clear meaning of the statutory language here unequivocally encompasses Mowad's conduct. Our doubts are raised initially by the fact that although the terms "importer" and "importing" are specifically mentioned in the statute, the terms "exporter" and "exporting" are conspicuously absent. Accordingly, because the express language of the statute does not clearly delineate the intended scope of its coverage, we shall turn to an examination of the legislative history of the statute, and to other related materials, for aid in ascertaining the intended sweep of this statutory prohibition.

Such an examination produces strong support for Mowad's position on this appeal. To begin with, the Gun Control Act was part of a comprehensive congressional legislative effort aimed at dealing with the rising tide of violent crime *within* the United States.[4] This congressional intent is clearly revealed by the preamble to the Gun Control Act:

> The Congress hereby declares that the purpose of this title is to provide support to Federal, State, and local law enforcement officials in their fight against

---

[4] In mid-1968, Congress considered an enacted Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, otherwise known as the State Firearms Control Assistance Act. Several weeks after passage of this Act, with the purpose of strengthening the firearms provisions contained in the just-enacted legislation, Congress passed the Gun Control Act of 1968. *See* H.R.Rep.No.1577, 90th Cong., 2d Sess., [1968] U.S.Code Cong. & Ad.News 4410, 4412.

> crime and violence, and it is not the purpose of this title . . . [to] provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title.

[1968] U.S.Code Cong. & Ad.News 1397[5] This declaration of congressional purpose was further amplified and detailed in the legislative history relating to the enactment of the Omnibus Crime Control and Safe Streets Act of 1968 and the Gun Control Act.[6] Once again, it is worthy of note that although the problems posed by *imported* firearms were recognized and discussed,[7] no mention is made of *exported* firearms. This omission is consistent with Mowad's argument that the exportation of firearms from the United States was not one of the congressional concerns which prompted the enactment of the applicable legislation.

Moreover, additional support for Mowad's position is found in the fact that although members of Congress pointed to a potential conflict between the import licensing system then being administered by the State Department[8] and the import restrictions proposed in the Omnibus Crime Control and Safe Streets Act and the Gun Control Act,[9] no such concern over potential statutory overlap was voiced in the context of the parallel export licensing system also administered by the State Department. Indeed, the statutory overlap in federal regulation

---

[5] *See also Findings and Declaration*, Title IV, Omnibus Crime Control and Safe Streets Act, [1968] U.S.Code Cong. & Ad.News 237, 270-271.

[6] *See, e.g.*, S.Rep.No.1097, 90th Cong., 2d Sess., [1968] U.S.Code Cong. & Ad.News 2112, 2113-2114; H.R.Rep.No.1577, 90th Cong., 2d Sess., [1968] U.S.Code Cong & Ad.News 4412-4413.

[7] *See, e.g.*, 114 Cong. Rec. 12310: "The files of law enforcement agencies throughout the country prove that 50 percent to 80 percent of America's guns are foreign imports. . . . If we seriously intend to curb crime in America, then we must certainly curb the import of surplus firearms, especially surplus handguns." (Statement of Senator Dodd).

[8] Pursuant to the terms of the Mutual Security Act of 1954, the State Department was delegated responsibility to administer programs to control both the import to and the export from the United States of firearms.

[9] *See, e.g.*, S.Rep.No.1097, 90th Cong., 2d Sess., *Individual Views of Messrs. Dirksen, Hruska, Thurmond, and Burdick on Title IV*, [1968] U.S.Code Cong. & Ad.News 2112, 2289, 2306.

of imported firearms was removed by President Johnson two days after passage of the Gun Control Act by the issuance of an Executive Order by which the import control functions previously assigned to the State Department were delegated to the Treasury Department. *See* Executive Order No. 11432, 33 Fed.Reg. 15701 (1968). Surely, if there were an overlap of the regulation of both imports and exports of firearms, the Executive Order's correction of only half the problem would be a curious solution.

[2] As further evidence supporting his position, Mowad points to the firearms export license form prepared by the State Department. This form, although containing meticulously detailed instructions regarding the steps to be followed in lawfully exporting firearms, does not indicate to the applicant that he must also register as a licensed firearms dealer with the Treasury Department as a precondition to the exporting of firearms lawfully.[10] In view of all the factors advanced by Mowad indicating the correctness of his interpretation of the statutory language, and the Government's failure to adduce any information to the contrary,[11] we conclude that Mowad's activities in

---

[10] Perhaps the most troubling aspect of the Government's position lies in the possibility that, if the Government's reasoning applied literally, a bona fide exporter of firearms who, unlike Mowad, had secured the necessary export license, could be arrested and charged with a violation of 18 U.S.C. § 992(a)(1) as he was transporting to their point of shipment firearms destined for export. At trial, the exporter could not raise as a defense either his lack of knowledge of the necessity to register as a "licensed dealer" in order to export firearms lawfully, or his lack of intent to violate the law, for we have held that scienter need not be established to make out a violation under 18 U.S.C. § 922(a)(1). *See United States v. Ruisi*, 460 F.2d 153, 156 (2d Cir.), *cert. denied*, 409 U.S. 914, 93 S.Ct. 234, 34 L.Ed.2d 176 (1972).

[11] We do not read the case cited by the Government, *Kaneshiro v. United States*, 445 F.2d 1266 (9th Cir.), *cert. denied*, 404 U.S. 992, 92 S.Ct. 537, 30 L.Ed.2d 543 (1971), as apposite authority on the issue raised by Mowad on this appeal, *i.e.* whether activities aimed solely at exporting firearms are within the scope of 18 U.S.C. § 922(a)(1). In *Kaneshiro*, unlike the present case, no challenge of any type to the sufficiency of the indictment was raised until the appeal. 445 F.2d at 1269. Further, the challenge to the indictment in that case merely alleged that, as worded, the charged violation failed to include all the required elements of the crime described by the relevant statute. *Id.* Moreover, the appellants in that case appear to have assumed that the exporting of firearms alone, if carried on with sufficient regularity, could qualify one as a

this case do not constitute illegal dealing in firearms in violation of 18 U.S.C. § 922(a)(1) and that his conviction on that charge must be reversed.[12]

Next, we turn to Mowad's challenge to his conviction for attempting to export firearms illegally. In this challenge Mowad alleges that the evidence presented to the jury was basically equivocal in nature, and was thus insufficient to allow the jury to conclude that Mowad's conduct had amounted to an attempt to export firearms illegally. According to Mowad, the weapons he had purchased were intended for members of his family in Lebanon. A relative of Mowad, allegedly a member of the Lebanese legislature, was to secure the necessary approval of the Lebanese government so that the State Department would permit the export of the firearms. As matters developed, however, Mowad contends that he was arrested before he could follow through with his supposed plan, and he contends that the arrest occurred in such a manner that, even assuming he intended to export the firearms without the required license, the Government could not prove how, when or where the illegal export would take place. Thus, Mowad argues that the Government failed to prove that his conduct constituted a "substantial step" toward the underlying substantive offense of exporting firearms illegally.

[3] In this Circuit we have adopted a two tier test in reviewing convictions where criminal attempts were charged.

"dealer" within the meaning of the statute, the very assumption Mowad contests here.

We also regard as misplaced the Government's suggestion that, by adopting Mowad's position, we create a gap in the overall regulatory system controlling the flow of firearms to and from the United States. The firearm export control system operated by the State Department imposes record-keeping obligations on exporters of firearms, *see* 22 C.F.R. § 122.05(a), the export license applications require adequate disclosure of pertinent information concerning proposed exports of firearms, and criminal sanctions are provided for noncompliance, *see, e.g.*, 22 C.F.R. § 127.03. In short, the State Department's export control system appears every bit as thorough and effective as the Treasury Department's import control system.

[12] In view of our disposition of the "illegal dealing" charge on this ground, we need not and do not reach Mowad's additional contention that a person may not be found to be a "dealer" within the meaning of 18 U.S.C. § 922(a)(1) in the absence of evidence that he actually sold firearms to others.

The first tier inquiry relates to a determination as to whether sufficient proof exists to establish that the accused possessed the requisite criminal intent. Once intent has been established, the second tier inquiry concentrates on whether the accused's conduct may be viewed as sufficiently corroborative of his established criminal intent. *See United States v. Mandujano*, 499 F.2d 370, 376-77 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114, 95 S.Ct. 792, 42 L.Ed.2d 812 (1975); *United States v. Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976).

[4] We need not detain ourselves in the intent phase of our inquiry, as the conversations surreptitiously recorded by the AT&F agents at the Sportsman's Rendezvous contain repeated declarations by Mowad of his intentions to ship large quantities of firearms to Lebanon, as well as his recognition that his plans could not be accomplished within the law. Therefore, we have only to determine whether Mowad's conduct was sufficiently corroborative of his criminal intent.

We have recently indicated that "[w]hether conduct represents a substantial step towards the fulfillment of a criminal design is a determination so dependent on the particular factual context of each case that, of necessity, there can be no litmus test to guide the reviewing courts." *United States v. Manley*, 632 F.2d 978, 988 (2d Cir. 1980). When the factual context of this case is examined, Mowad's conduct is not nearly as equivocal as he maintains it is. First, Mowad's characterization of the transaction as a typical legal purchase of firearms is inaccurate. To the contrary, Mowad had been informed that the firearms he was purchasing were stolen, and, as he had purchased firearms in conformance with the law on several previous occasions, Mowad knew that the required paperwork for the 110 handguns had not been completed. We further observe that legitimate purchases of firearms are not often consummated in abandoned warehouses under armed guard, as was the situation here.

In addition, several days prior to picking up the weapons, Mowad had a telephone conversation with Berger in which Mowad stated that the arranged pickup time would "leave us

more than six, seven hours."[13] Testimony at trial by an AT&F agent, who had posed as a guard at the warehouse, established that after the weapons had been crated, Mowad had inquired of him as to the best route to New York City. The jury also was aware of the false exculpatory statements made by Mowad shortly after he was placed under arrest, *see* footnote 2, *supra*. In view of this evidence, we are convinced that the jury's conviction of Mowad on the attempted illegal export charge is consistent with the requirement that the conduct of the accused "has progressed sufficiently to minimize the risk of an unfair conviction," *United States v. Busic*, 549 F.2d 252, 257 n.9 (2d Cir. 1977).

[5, 6] Finally, Mowad contests his conviction of the conspiracy count. Mowad first contends that, because the jury was instructed that he could be convicted on the conspiracy charge if the evidence demonstrated that he had conspired with others to commit either of the other two charged violations of law, our reversal of his conviction on the illegal dealing charge requires that his conspiracy conviction be vacated as well. The law in this Circuit, however, is to the effect that a conspiracy conviction will be allowed to stand if proof exists of the defendant's intent to commit the offense which survives the review. *See United States v. Dixon*, 536 F.2d 1388, 1402 (2d Cir. 1976). Here, as we have indicated, proof of Mowad's intent to attempt to export firearms illegally was more than adequate.

[7] Next, Mowad alleges that the proof that he acted in concert with others to accomplish his criminal design is insufficient to support his conspiracy conviction. However, an objective view of the evidence demonstrates otherwise. Two of Mowad's companions, Talal Doueihi and Sayid Kortobani, who were tried separately, entered guilty pleas to the attempted illegal export charge. Proof introduced at trial established that both Mowad and Kortobani had purchased handguns from the Sportsman's Rendezvous which they indicated were to be used as bribes to obtain clearance for future shipments of firearms through Le-

[13] Mowad's remark prompted Berger to add: "That's all. Fly them the hell out of here.", to which Mowad responded: "Ya, that's what I'm saying."

banese customs. Both Mowad and Kortobani visited the Sportsman's Rendezvous on March 26, 1979, to firm up the details of the eventual handgun order, and both haggled with Ciulla over the price of the shipment. Finally, both Mowad and Kortobani paid portions of the total purchase price for the weapons to Ciulla and Berger. Given this evidence, the jury rationally could have found the existence of an unlawful agreement, at the very least one between Mowad and Kortobani, upon which to predicate Mowad's conspiracy conviction.

Finally, Mowad contends that a "conspiracy to attempt" the commission of a substantive offense cannot, as a matter of law, state a crime. Although this challenge to his conspiracy conviction has more merit perhaps than his challenges just discussed, we conclude that it too must fail. In support of his position, Mowad points to a case recently decided by the Fifth Circuit, *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980), which held that a "conspiracy to attempt" charge in an indictment failed to state an offense. In *Meacham*, however, the Government attempted to combine the conspiracy and attempt provisions contained in two identically worded sections of the Comprehensive Drug Abuse Prevention and Control Act of 1970 to synthesize the offense of "conspiracy to attempt."[14]

[8] The situation in the present case, however, more closely resembles that involved in *United States v. Clay*, 495 F.2d 700 (7th Cir.), *cert. denied*, 419 U.S. 937, 95 S.Ct. 207, 42 L.Ed.2d 164 (1974), in which a "conspiracy to attempt" charge was held to be sufficient to state an offense. In *Clay*, as here, the Government combined the general criminal conspiracy provision, 18 U.S.C. § 371, with a specific statutory provision describ-

---

[14] As the Fifth Circuit noted, the statutory provisions involved both stated: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both . . . ." 21 U.S.C. § 846; 21 U.S.C. § 963. Thus, the Fifth Circuit correctly observed that the Government, by combining these two statutory provisions, had generated four discrete crimes (*i. e.*, conspiracy, attempt, conspiracy to attempt, attempt to conspire) from the three words "attempts or conspires." 626 F.2d at 508. The Fifth Circuit quite properly questioned the Government's assertion that Congress had contemplated and intended this result when it enacted the relevant statutory provisions.

ing an "offense against the United States."[15] Although it is probable that the "conspiracy to attempt" charge against Mowad was the result of careless indictment drafting and not innovative legal reasoning, the Government's charge contains all elements necessary to prosecute a conspiracy: a provision making the act of conspiring a crime and a provision making the object of the conspiracy a crime. Thus, because we believe that factors involved in *Meacham* that are not present here provide a sufficient basis for distinguishing that case from the present case, we regard *Clay* as controlling and accordingly affirm Mowad's conspiracy conviction.

Mowad's remaining claim, involving his request for a new trial on the grounds that a potential juror's allegedly prejudicial remark "impermissibly infected" the jury panel, is so devoid of merit that discussion of this claim is unwarranted.

The judgment of the district court is affirmed in part and reversed in part, and the cause is remanded for action in the district court consistent with this opinion.

---

[15] In this case, 22 U.S.C. § 2778(c) makes it a crime to violate any rule or regulation issued under that section. In turn, 22 C.F.R. § 127.01, a regulation so promulgated, provides:

> (a) It is unlawful to export or attempt to export from the United States any article or technical data for which a license or approval is required by this subchapter without first obtaining the required license or written approval from the Department of State. We agree with the Ninth Circuit that Congress may constitutionally authorize the Executive Branch to promulgate regulations in the arms control field which criminalize various acts involving the importation and exportation of arms. *United States v. Gurrola-Garcia*, 547 F.2d 1075 (9th Cir. 1976).

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 27th day of April, one thousand nine hundred and eighty-one.

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs. Docket No. 80-1197.

ANTOINE MOWAD,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Antoine Mowad,

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro,

Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA

v.

Criminal No. 79-43

ANTOINE MOWAD, SAYID KORTOBANI,
MYLET MOUAWAD, and
TALAL MOHSEIN DOUEIHI

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

That beginning on or about the 1st day of November, 1978, to until on or about the 6th day of April, 1979, in the District of Connecticut, ANTOINE MOWAD, SAYID KORTOBANI, MYLET MOUAWAD and TALAL MOHSEIN DOUEIHI, the defendants herein, knowingly did engage in the business of dealing in firearms without being licensed to do so under the provisions of Chapter 44, Title 18, United States Code.

All in violation of Title 18, United States Code, Sections 922(a), 924(a) and Title 18, United States Code, Sections 2(a) and 2(b).

COUNT TWO

That on or about April 6, 1979, in the District of Connecticut, ANTOINE MOWAD, SAYID KORTOBANI, MYLET MOUAWAD and TALAL MOHSEIN DOUEIHI, willfully did attempt

to export from the United States of America Category I firearms, to wit, revolvers and pistols of calibre .50 or less, without having first obtained therefor a license from the United States Department of State.

All in violation of Title 22, United States Code, Sections 401 and 2778(c), and Title 22, C.F.R. Sections 123.01 and 127.03, and Title 18, United States Code, Sections 2(a) and 2(b).

COUNT THREE

That from on or about the 1st day of November, 1978, and continuously thereafter up to and including the 6th day of April, 1979, in the District of Connecticut and elsewhere, ANTOINE MOWAD, SAYID KORTOBANI, MYLET MOUAWAD and TALAL MOHSEIN DOUEIHI, the defendants herein, willfully and knowingly did combine, conspire, confederate and agree together with each other and with diverse other persons to the grand jury both known and unknown to commit the following offenses against the United States of America:

1. to knowingly engage in the business of dealing in firearms without being licensed to do so under the provisions of Chapter 44, Title 18, United States Code, in violation of Title 18, United States Code, Sections 922(a)(1) and 924(a).

2. to attempt to export from the United States of America Category I firearms, to wit, revolvers and pistols of calibre .50 or less, without having first obtained therefor a license from the United States Department of State, in violation of Title 22, United States Code, Sections 401, 2778(c) and Title 22, Code of Federal Regulations, Sections 123.01 and 127.03.

OVERT ACTS

In furtherance of the conspiracy, and to effect the objects thereof, the defendants performed the following overt acts:

1. On November 3, 1978, ANTOINE MOWAD had a meeting at the Sportsmen's Rendezvous, Milford, Connecticut.

2. On November 28, 1978, SAYID KORTOBANI had a meeting at the Sportsmen's Rendezvous, Milford, Connecticut. During the meeting KORTOBANI stated that ANTOINE MOWAD was in Lebanon, and would return in two to three weeks.

3. On January 3, 1979, ANTOINE MOWAD and MYLET MOUAWAD had a meeting at the Sportsmen's Rendezvous, Milford, Connecticut.

4. On January 12, 1979, ANTOINE MOWAD and MYLET MOUAWAD had a meeting at the Sportsmen's Rendezvous, Milford, Connecticut.

5. On January 13, 1979, ANTOINE MOWAD and MYLET MOUAWAD had a meeting at the Sportsmen's Rendezvous, Milford, Connecticut.

6. On February 1, 1979, ANTOINE MOWAD, SAYID KORTOBANI and MYLET MOUAWAD had a meeting at the Sportsmen's Rendezvous, Milford, Connecticut.

7. On February 21, 1979, ANTOINE MOWAD had a meeting at the Sportsmen's Rendezvous, Milford, Connecticut.

8. On February 26, 1979, ANTOINE MOWAD and SAYID KORTOBANI had a meeting at the Yankee Gun Shop, Orange, Connecticut.

9. On February 28, 1979, SAYID KORTOBANI and TALAL MOHSEIN DOUEIHI had a meeting at the Sportsmen's Rendezvous, Milford, Connecticut.

10. On March 8, 1979, ANTOINE MOWAD, MYLET MOUAWAD and TALAL MOHSEIN DOUEIHI had a meeting at the Sportsmen's Rendezvous, Milford, Connecticut.

11. On March 19, 1979, ANTOINE MOWAD, MYLET MOUAWAD, and SAYID KORTOBANI had a meeting at the Sportsmen's Rendezvous, Milford, Connecticut.

12. On March 25, 1979, ANTOINE MOWAD, MYLET MOUAWAD and SAYID KORTOBANI had a meeting at the Sportsmen's Rendezvous, Milford, Connecticut.

13. On March 26, 1979, ANTOINE MOWAD, SAYID KORTOBANI, and MYLET MOUAWAD had a meeting at the Sportsmen's Rendezvous, Milford, Connecticut. At this meeting, SAYID KORTOBANI PAID $1,500 in cash as a deposit for a quantity of firearms.

14. On March 27, 1979, ANTOINE MOWAD had a meeting with SAYID KORTOBANI. At this meeting, ANTOINE MOWAD provided the exterior measurements for the crates that were being prepared to ship the firearms.

15. On March 28, 1979, ANTOINE MOWAD and MYLET MOUAWAD, had a meeting at the Sportsmen's Rendezvous, Milford, Connecticut.

16. On March 29, 1979, ANTOINE MOWAD, MYLET MOUAWAD, SAYID KORTOBANI and TALAL MOHSEIN DOUEIHI had a meeting at the Sportsmen's Rendezvous, Milford, Connecticut.

17. On March 30, 1979, SAYID KORTOBANI and TALAL MOHSEIN DOUEIHI had a meeting at the Sportsmen's Rendezvous, Milford, Connecticut.

18. On March 31, 1979, ANTOINE MOWAD, MYLET MOUWAD, SAYID KORTOBANI and TALAL MOHSEIN DOUEIHI, had a meeting at the Sportsmen's Rendezvous, Milford, Connecticut. At this time they placed an order for 50 S & W Model 59 9mm semi-automatic handguns, 50 Colt .45 calibre semi-automatic handguns, and 10 Colt Super .38 calibre semi-automatic handguns. They also ordered 70 empty Colt boxes. At this time they paid an additional $1,000 deposit for the firearms.

19. On April 3, 1979, ANTOINE MOWAD, MYLET MOUAWAD, SAYID KORTOBANI and TALAL MOHSEIN DOUEIHI had meeting at the Sportsmen's Rendezvous, Milford, Connecticut.

20. On April 5, 1979, ANTOINE MOWAD had a telephone conversation.

21. On April 6, 1979, ANTOINE MOWAD, MYLET MOUAWAD, SAYID KORTOBANI and TALAL MOHSEIN DOUEIHI had a meeting at the Yankee Gun Shop, Orange, Connecticut.

22. On April 6, 1979, ANTOINE MOWAD, MYLET MOUAWAD, SAYID KORTOBANI and TALAL MOHSEIN DOUEIHI travelled to Warehouse No. 6, Lidelco Building, 170 Alabama Street, New Haven, Connecticut, at which time they took possession of 50 Smith & Wesson Model 59 handguns, 50 Colt .45 calibre handguns and 10 Colt Super .38 handguns, and packed them in two wooden crates.

All in violation of Title 18, United States Code, Section 371.

A TRUE BILL
FOREMAN

RICHARD BLUMENTHAL
UNITED STATES ATTORNEY

HAROLD JAMES PICKERSTEIN
CHIEF ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v.

ANTOINE MOWAD, et al

Criminal No. N-79-43
MAY 5, 1980

MOTION FOR ARREST OF JUDGMENT ON COUNTS I, II and III

The defendant, Antoine Mowad, respectfully requests that pursuant to Federal Rule of Criminal Procedure 34, that the Court arrest judgment of conviction as to Counts I, II and III of the indictment.

The defendant contends that Counts I, II and III do not constitute an offense by the defendant against the United States.

* * *

3. (c) (1) That there cannot be a conspiracy to attempt to export as a matter of statutory law, and therefore the alleged conduct of the defendant does not constitute an offense.
(2) That there cannot be a conspiracy to attempt to export as a matter of Due Process pursuant to the Fifth Amendment to the United States Constitution, and therefore the alleged conduct of the defendant does not constitute an offense.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v.

ANTOINE MOWAD, et al

Criminal No. N-79-43
MAY 5, 1980

MOTION FOR NEW TRIAL

The defendant, Antoine Mowad, respectfully requests that the Court grant a new trial pursuant to Federal Rule of Criminal Procedure 33.

The defendant respectfully makes this motion alternatively to his Motion for Arrest of Judgment and Motion for Judgment of Acquittal.

Defendant's grounds include:

* * *

18. That the Court erred in failing to instruct the jury on the definition of conspiracy to attempt and that such error was prejudicial.

* * *

DISTRICT COURT'S JURY CHANGE ON COUNT III—CONSPIRACY

Count III of the indictment alleges that on or about the first day of November, 1978, and continuously thereafter, up to and including the sixth day of April, 1979, in the District of Connecticut, Antoine Mowad, the defendant, willfully and knowingly combined, conspired, confederated and agreed together with Sayid Kortobani, Mylet Mouawad and Talal Mohsein Doueihi to commit the following offenses:

I. To knowingly engage in the busines of dealing in firearms without a dealer's license.

II. To attempt to export from the United States Category I firearms, to wit, revolvers and pistols of calibre .50 or less, without having first obtained an export license.

The crime charged in Count III of the indictment is a conspiracy to export to Lebanon certain arms, ammunition and implements of war without first obtaining a license or written approval from the United States Department of State, and also to engage in the business of dealing in firearms without a license, and the conspiracy may be established regardless of whether or not the purposes of the conspiracy were accomplished.

A conspiracy is a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means.

The gist of the offense in this indictment is the combination or agreement to export to Lebanon the arms, ammunition and implements of war, which the Court has previously mentioned, without a license or written approval from the Department of State.

You will recall, ladies and gentlemen, that the arms mentioned in the indictmment are a calibre .50 or less firearm. I do not believe that there is any evidence with respect to ammunition, so that insofar as I refer to ammunition, it is not part of the charge.

Now, while the conspiracy involves an agreement to violate the law, it is not necessary that the persons charged met together and entered into an express or formal agreement, or that they stated, in words or writing, what the scheme was, or how it was to be carried out.

It is sufficient to show that they tacitly came to a mutual understanding to accomplish an unlawful act.

Such an agreement may be inferred from the circumstances and the conduct of the parties, since ordinarily a conspiracy is characterized by secrecy.

Indeed, it would be extraordinary if there were such a formal and written agreement.

For a conspiracy there must be a least two parties who enter into an agreement with the specific intent to violate the law, one of whom must be the defendant.

If the other party or parties to the agreement to act did not intend to violate the law, there would be no conspiracy even if you were to find that the defendant himself had such an intent.

The evidence in the case need not establish that all the means or methods set forth in the indictment were agreed upon to carry out the alleged conspiracy, nor that all means or methods which were agreed upon were actually used or put into operation.

What the evidence must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed, and that one or more of the means or methods described in the indictment were agreed upon to be used in an effort to effect or accomplish some object or purpose of the charged conspiracy, and that two or more persons, including the defendant, were knowingly members of the conspiracy, as charged in the indictment.

Nor would there be a conspiracy if the defendant has no such specific intent, even if you were to find another person or persons had such an intent.

In determining whether the conspiracy charged in this indictment actually existed, you may consider the evidence of the acts

and conduct of the alleged conspirators as a whole and the reasonable inferences to be drawn from such evidence.

If, upon such consideration of the evidence, you find beyond a reasonable doubt that the minds of at least two of the alleged conspirators, one of whom was the defendant, met in an understanding way and that they agreed, as I have explained a conspiratorial agreement to you, to work together in furtherance of the unlawful purpose alleged in the indictment, then proof of the existence would be complete.

Then you must, in considering the offense of conspiracy, first determine whether the Government has proven to you beyond a reasonable doubt that the defendant and another, or others, alleged in the indictment entered into an agreement with the object to violate the law.

The gist of a conspiracy is an agreement to violate the law. For such an unlawful agreement both the defendant and one or more of those other persons alleged in the indictment must have formulated the agreement with the specific intent to violate the law.

So if the Government proves to you beyond a reasonable doubt that the defendant entered into such an agreement to violate the law, but the Government fails to prove to you beyond a reasonable doubt that any other person alleged in the indictment entered into an agreement with that specific intent to violate the law, then you must find the defendant not guilty since obviously one cannot conspire with himself.

For a conspiracy there must be two parties, at least two parties, who enter into an agreement with the specific intent to violate the law, and one of them must be the defendant.

Where two people agree, but both do not intend as an object of such agreement to violate the law, there would be no conspiracy and both individuals would not be guilty even if one party to the agreement had the intent to violate the law as an object of that agreement.

It is not necessary in order to convict the defendant on a charge of conspiracy, that all the persons mentioned in the indictment shall have been members of the conspiracy from the beginning. The joinder of a new party in a conspiracy does not remove the guilt of the original conspiracy.

A new member of the conspiracy adopts the prior acts and declarations of his conspirators made in furtherance of the conspiracy.

Different persons may become members at different times. They may perform different parts of the conspiracy. They need not be all aware of all of the ramifications of the conspiracy.

If you find, as alleged in this case, that a conspiracy existed and if you find that the defendant in this case knew of the conspiracy and purposely took some part, large or small, in carrying it into effect, he became part and parcel of it and he may be found guilty of conspiracy.

Four essential elements are required to be proved in order to establish the offense of conspiracy as it is charged in the indictment:

First: You must find that the conspiracy described in the indictment was willfully formed and was existing at or about the time alleged;

Second: You must find that the defendant willfully became a member of the conspiracy;

Third: That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment at or about the time and place alleged; and,

Fourth: That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged.

If you the jury find beyond a reasonable doubt from the evidence in the case that existence of the conspiracy charged in the indictment has been proved and that during the existence of the conspiracy one of the overt acts alleged was knowingly done

by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy offense charged is complete; and it is complete as to every person who is mentioned and found by you to have been willfully a member of the conspiracy at the time that the overt act was committed, regardless of which of the conspirators did the overt act.

An overt act, ladies and gentlemen, is any act knowingly committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy.

The overt act need not be criminal in nature, if considered separately and apart from the conspiracy. It may be an innocent act. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

It is not necessary that all of the overt acts charged in the indictment were performed. One overt act is sufficient.

Moreover, the Government may prove an overt act of a conspirator not detailed in the indictment occurring during the life of the conspiracy for the purpose of proving it.

One may become a member of a conspiracy without full knowledge of the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

Before a jury may find that a defendant, or any other person, has become a member of the conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed, and that the defendant, or other person who was claimed to have been a member, willfully participated in the unlawful plan, with the intent to advance or further some object or purpose of the conspiracy.

To act or participate willfully means to act or participate voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to

do something the law requires to be done; that is to say, to act or participate with a bad purpose either to disobey or disregard the law.

So, if a defendant, or any other person, with understanding of the unlawful character of a plan, knowingly encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a willful participant and conspirator.

One who willfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether a conspiracy existed, the jury should consider the actions and declarations of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed and that he was one of its members.

In your consideration of the evidence in the case as to the offense of conspiracy charged, you should first determine whether or not the conspiracy existed, as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not the defendant, Mr. Mowad, willfully became a member of the conspiracy.

If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in indictment was willfully formed and that the defendant willfully became a member of the conspiracy either at its inception or afterwards, and that thereafter one or more of the conspirators knowingly committed one or more of the overt acts charged in furtherance of some object or purpose of the conspiracy, then there may be a conviction even though the conspirators may not have succeeded in accomplishing their common objective or purpose and in fact may have failed of so doing.

Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then the statement thereafter knowingly made and the acts thereafter knowingly done, by any person whom you also find to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

Otherwise, the admission or incriminatory statement made or act done outside of court by any person may not be considered as evidence against any other person who was not present and did not hear the statement made or see the act done.

Therefore, statements of any conspirator, which are not in furtherance of the conspiracy, or were made before its existence, may be considered as evidence only against the person making them, and would not be evidence against any other party.

If the Government has failed to prove to you beyond a reasonable doubt that Mr. Mowad and another person alleged in the indictment agreed to join in a conspiracy, then you must find the defendant not guilty of Count III of the indictment irrespective of his intent.

If you find the Government has met its burden as to this element, you must consider the next element, that is, whether the defendant and another person alleged in the conspiracy agreed to commit the specific offenses alleged in the indictment, that is:

To knowingly engage in the business of dealing in firearms without a dealer's license;

Second: To unlawfully and willfully attempt to export from the United States Category I firearms, to wit, revolvers and pistols of calibre .50 or less, without having first obtained an export license.

If you find that the defendant is guilty of conspiracy, as charged in Count III, that is, if you have found that the Government has proved beyond a reasonable doubt each of the elements of the crime of conspiracy, as I have explained those to you, you may also find him guilty of a substantive offense as charged in any other count of the indictment, provided you find that the essential elements of that Count, as defined in my instructions to you, have been established beyond a reasonable doubt and that is each element of that crime has been established beyond a reasonable doubt, and provided that you also find beyond a reasonable doubt:

First: That the offense defined in the substantive count was committed pursuant to the conspiracy; and,

Second: That the defendant was a member of the conspiracy at the time the substantive offense was committed.

Under the conditions just defined a defendant may be found guilty of a substantive count even though he did not participate in the acts constituting the offense as defined in the substantive count.

The reason for this is that a co-conspirator committing a substantive offense pursuant to a conspiracy is held to be the agent of the other conspirators.

With respect to the third count of the indictment, of course, it is your duty to give personal consideration of the case to Mr. Antoine Mowad who is the only person mentioned in that count who is currently on trial.

COURT'S EXHIBIT 1—NOTE FROM JURY

Your Honor,

There is some confusion as to the legal definition of the word attempt as indicated in count two of the indictment. Please clarify the legal definition for count two.

Jury Foreman
Vincent A. Corniello

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v.

ANTOINE MOWAD

Criminal No. N-79-43

AMENDED ORDER

Pursuant to the judgment of the United States Court of Appeals for the Second Circuit in *United States v. Mowad*, 641 F.2d 1067, 1072 (2d Cir. 1981), the sentence imposed by this Court on Count One of the Superseding Indictment herein is Ordered Vacated;

And it is further Ordered that Count One of the Superseding Indictment herein be Dismissed.

Nothing herein shall be construed to effect the sentence of this Court on Counts Two or Three of the Superseding Indictment herein.

ELLEN BREE BURNS

UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this ____ day of May, 1981.

STATUTES INVOLVED

Title 18 U.S.C. Section 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18 U.S.C. Section 922 (a) (1):

It shall be unlawful for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce.

Title 18 U.S.C. Section 924 (a):

Whoever violates any provision of this chapter or knowlingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

Title 21 U.S.C. Section 846:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 21 U.S.C. Section 963:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment

prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 22 U.S.C. Section 401 (a):

Whenever an attempt is made to export or ship from or take out of the United States any arms or munitions of war or other articles in violation of law, or whenever it is known or there shall be probable cause to believe that any arms or munitions of war or other articles are intended to be or are being or have been exported or removed from the United States in violation of law, the Secretary of the Treasury, or any person duly authorized for the purpose by the President, may seize and detain such arms or munitions of war or other articles and may seize and detain any vessel, vehicle, or aircraft containing the same or which has been or is being used in exporting or attempting to export such arms or munitions of war or other articles. All arms or munitions of war and other articles, vessels, vehicles, and aircraft seized pursuant to this subsection shall be forfeited.

Title 22 U.S.C. Section 2778 (b) (1):

As prescribed in regulations issued under this section, every person (other than an officer or employee of the United States Government acting in an official capacity) who engages in the business of manufacturing, exporting, or importing any defense articles or defense services designated by the President under subsection (a) (1) of this section shall register with the United States Government agency charged with the administration of this section, and shall pay a registration fee which shall be prescribed by such regulations.

Title 22 U.S.C. Section 2778 (c):

Any person who willfully violates any provision of this section or section 2779 of this title or any rule or regulation issued under either section, or who willfully, in a registration or license application or required report, makes any untrue statement of a material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $100,000 or imprisoned not more than two years, or both.

REGULATIONS INVOLVED

Title 22 C.F.R. Section 122.01 (a):

Persons (as defined in Section 121.17 of this subchapter) engaged in the business, in the United States, of manfacturing or exporting articles enumerated in the U.S. Munitions List shall be required to register with the Secretary of State. Manufacturers, whether they engage in export, shall also be required to register.

Title 22 C.F.R. Section 123.01:

Equipment (see Section 121.02 of this subchapter for definition) on the U.S. Munitions List shall not be exported from the United States until a license has been obtained from the Department of State, or it is otherwise exempt under other provisions of this subchapter. As a condition precedent for the issuance of an export license for equipment the Department of State may require all pertinent documentary information regarding the proposed transaction, and may also require the execution of an appropriate bond.

Title 22 C.F.R. Section 127.01:

It shall be unlawful for any person to export or attempt to export from the United States any of those articles on the U.S. Munitions List without first having obtained a license therefor, unless written approval was obtained from the Department of State or an exemption from this requirement is authorized by this subchapter.

Title 22 C.F.R. Section 127.03:

Any person who willfully violates any provision of Section 414 of the Mutual Security Act of 1954, as amended (22 U.S.C. 1934), or any rule or regulation issued under that section, shall, upon conviction, be fined not more than $25,000, or imprisoned not more than two years, or both.

MODEL PENAL CODE SECTION INVOLVED

Article 5. Inchoate Crimes

Section 5.01. Criminal Attempt.

(1) *Definition of attempt.* A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result, without further conduct on his part; or

(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) *Conduct which may be held substantial step under paragraph (1) (c).* Conduct shall not be held to constitute a substantial step under paragraph (1) (c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the crime;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

(3) *Conduct designed to aid another to commit crime.* A person who engages in conduct designed to aid another to commit a crime which would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.

(4) *Renunciation of criminal purpose.* When the actor's conduct would otherwise constitute an attempt under paragraph (1) (b) or (1) (c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability for the attempt of an accomplice who did not join in such abandonment or prevention.

Office-Supreme Court, U.S.
FILED
AUG 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2196

In the Supreme Court of the United States

OCTOBER TERM, 1980

ANTOINE MOWAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. I[illegible]VELL JENSEN
Assistant Attorney General

SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, a conspiracy conviction may stand after one of the two objects of the conspiracy charged is found on appeal not to be unlawful.

2. Whether petitioner may be convicted of conspiracy to attempt to export firearms, where attempting to export firearms is specifically proscribed.

3. Whether the evidence was sufficient to sustain petitioner's conviction for attempting to export firearms without a license.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Chiarella v. *United States*, 445 U.S. 222 5

Hamling v. *United States*, 418 U.S. 87 10

Russell v. *United States*, 369 U.S. 749 10

Stromberg v. *California*, 283 U.S. 359 ..... 4, 5

United States v. *Baranski*, 484 F. 2d 556 7

United States v. *Carman*, 577 F. 2d 556 8

United States v. *Clay*, 495 F. 2d 700, cert. denied, 419 U.S. 937 10

United States v. *Dansker*, 537 F. 2d 40, cert. denied, 429 U.S. 1038 ..... 8, 9

United States v. *Feola*, 420 U.S. 671 10

United States v. *Mandujano*, 499 F. 2d 370, cert. denied, 419 U.S. 1114 11

United States v. *Meacham*, 626 F. 2d 503 ... 10, 11

United States v. *Tarnopol*, 561 F. 2d 466 9

Van Liew v. *United States*, 321 F. 2d 664 8

Page

Statutes and regulations:

18 U.S.C. 2 ..... 1, 2
18 U.S.C. 371 ..... 2, 9, 10
18 U.S.C. 922 3
18 U.S.C. 922(a) 4, 5
18 U.S.C. 922(a)(1) 1
22 U.S.C. 401 ..... 2, 5
22 U.S.C. 2778(b) 3
22 U.S.C. 2778(c) 2, 5, 9
22 C.F.R. 123.01 ..... 2, 5, 9
22 C.F.R. 127.01 9
22 C.F.R. 127.03 ..... 2, 5, 9

Miscellaneous:

Model Penal Code (Prop. Official Draft, 1962) 11

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2196

ANTOINE MOWAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 641 F. 2d 1067.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1981. A petition for rehearing was denied on April 27, 1981 (Pet. App. 13a). The petition for a writ of certiorari was filed on June 26, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1) and 18 U.S.C. 2 (Count One), attempting to export firearms without an export license, in violation of

22 U.S.C. 401 and 2778(c), 22 C.F.R. 123.01 and 127.03, and 18 U.S.C. 2 (Count Two), and of conspiracy to commit the two substantive offenses, in violation of 18 U.S.C. 371 (Count Three). He was sentenced to concurrent terms of two years' imprisonment on Counts One and Two, subsequently reduced to 18 months' imprisonment, to be followed by a consecutive term of five years' probation on Count Three. On appeal, the court of appeals affirmed petitioner's convictions on Counts Two and Three, but reversed petitioner's conviction on Count One, remanding with instructions to dismiss Count One and vacate the sentence imposed thereunder (Pet. App. 1a-12a).

1. The evidence at trial is set forth in the opinion of the court of appeals. Briefly, it shows that petitioner's convictions arose out of an investigation by the Bureau of Alcohol, Tobacco and Firearms (BATF) of individuals attempting to purchase a large number of firearms for export to Lebanon. Recordings were made of petitioner's conversations with the owner of one gun shop and an employee of another shop, both of whom were cooperating with the BATF, as well as with an undercover BATF agent posing as a pilot. In these conversations, petitioner, a federally registered exporter of firearms, and his companions expressed interest in periodically purchasing large quantities of firearms for shipment to Lebanon. In March 1979, after petitioner had apparently received assurances that previously existing obstacles posed by Lebanese customs had been eliminated, he and his associate placed an order for an assortment of 110 handguns, which they believed were stolen and for which they paid a total of $16,750 (Pet. App. 2a-4a).

On April 6, 1979, petitioner and his associates took delivery of the guns at a warehouse in New Haven and packed them into two large wooden crates. Federal agents arrested petitioner and his colleagues as they were removing the

crates from the warehouse (Pet. App. 3a). Circumstantial evidence demonstrated that petitioner intended to fly the shipment to Lebanon that very evening. After his arrest, petitioner denied any prior knowledge of the existence of the handguns. Although he had registered as an exporter of firearms, petitioner had never applied for an export license to ship firearms to Lebanon. Testimony of a State Department official revealed that because of the unsettled conditions prevailing, the Department's Office of Munitions Control was not issuing licenses to ship firearms to Lebanon, other than those destined for diplomatic personnel.[1]

2. On appeal, petitioner argued (1) that as a firearms exporter registered with the Department of State pursuant to 22 U.S.C. 2778(b), he was exempt from 18 U.S.C. 922, which prohibits firearms dealing by individuals not holding licenses from the Department of Treasury; (2) that the evidence, in any event, did not support his conviction on Count One; (3) that the evidence did not support his conviction on Count Two; (4) that if the conviction on Count One was reversed, the conspiracy conviction could not stand either; (5) that there was insufficient proof of a criminal agreement to sustain the conspiracy charge; (6) that the conspiracy charge, as applied to the substantive offense charged in Count Two (attempt to export firearms without a license) did not state a criminal offense; and (7) that certain comments by a member of the jury venire, during jury selection, which prompted her dismissal for cause and evoked a cautionary instruction to the entire jury panel, so prejudiced the panel as to have required a mistrial.

Relying primarily on legislative history, the court of appeals held (Pet. App. 4a-8a) that exportation of firearms by an exporter registered with the Department of State does

---

[1]J.A. 500. "J.A." refers to the joint appendix filed in the court of appeals.

not constitute a violation of 18 U.S.C. 922(a), notwithstanding the exporter's failure to obtain a license from the Treasury Department as a firearms dealer.[2] Petitioner's challenge to the sufficiency of the evidence to support the conviction on Count Two was rejected (Pet. App. 8a-10a), the court finding that the evidence supported a finding of the requisite criminal intent and the existence of substantial steps toward consummation of the crime. Petitioner's contentions regarding the conspiracy count were likewise rejected. Reversal of petitioner's conviction on Count One did not require reversal of his Count Three conviction in the circumstances of this case, the court held, because it was clearly proven that petitioner and his colleagues conspired to commit the offense charged in Count Two (*id.* at 10a-11a). The court further held that Count Three, applying the general criminal conspiracy statute to the substantive offense of attempted unlawful exportation of firearms, charged a prosecutable offense (*id.* at 11a-12a). Finally, petitioner's claim of prejudice stemming from comments by an excused member of the jury venire was rejected as frivolous (*id.* at 12a).

ARGUMENT

1. Petitioner contends (Pet. 7-17) that his conviction on the conspiracy count (Count Three) cannot stand because the court of appeals concluded that one of the two substantive offenses charged as objectives of the conspiracy did not, as a matter of law, constitute a crime. In *Stromberg* v. *California*, 283 U.S. 359 (1931), this Court reversed a conviction on a single substantive count that, under the instructions to the jury, may have rested on any of three separate theories, one of which was deemed inconsistent with the Constitution. The reversal was bottomed on the impossibility of determining from the general verdict whether the

---

[2]The court accordingly did not reach petitioner's other arguments concerning Count One. Pet. App. 8a n.12.

conviction had a permissible basis. This case, unlike *Stromberg*, involves a conspiracy conviction and presents no issue of a conviction resting on an unconstitutional theory. Recently, in *Chiarella* v. *United States*, 445 U.S. 222, 237 n.21 (1980), this Court, following *Stromberg*, stated that a criminal conviction may not be upheld if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct. The pertinent inquiry accordingly becomes whether the jury might have found a conspiracy only with respect to the invalidated substantive charge. On the facts of this case there is no such possibility, and petitioner's claim is accordingly without merit.

a. The two substantive counts of the indictment, which were listed as objectives of the conspiracy charged, concerned the same activities and the same firearms, differing only in the penal provision relied upon, the explicit reference to unlawful exportation in Count Two, and the related fact that Count One, unlike Count Two, charged a completed offense. The convictions on these two counts rested on the identical evidence. The first count was held to be deficient, not because the jury could not properly have concluded that petitioner had committed the acts charged,[3] but because the court of appeals concluded that Congress had not intended 18 U.S.C. 922(a) to proscribe firearms dealings by one registered as a firearms exporter, even where, as here, the transaction in question was shown to constitute an illegal export because no license authorizing the contemplated shipment had been obtained. Thus, the thrust of the court of appeals' ruling was simply that the charge applicable to petitioner's unlawful conduct was violation of 22 U.S.C. 401 and 2778(c), and 22 C.F.R. 123.01 and 127.03—in other words the charge embodied in Count Two (Pet. App. 6a-7a).

---

[3]Indeed, petitioner acknowledges that he did so (Pet. 15-16).

Under the circumstances of this case there is no possibility that the jury could have concluded that petitioner conspired only to deal in firearms, but not to export them illegally. Petitioner's conviction on the substantive offense of attempted illegal exportation of firearms charged in Count Two reveals the jury's conclusion that he possessed the requisite criminal intent and committed overt acts sufficient to sustain the conspiracy conviction in those respects, and petitioner does not argue otherwise. Rather, petitioner argues only (Pet. 12-13, 16-17) that the conviction on Count Two does not necessarily establish a jury finding as to the agreement element of the conspiracy offense, as it applies to the offense charged in Count Two.

In light, however, of the relationship between Count One and Count Two explained above, the jury's finding of the necessary agreement is inescapably inferred from the conviction on Count Three in this case. First, while petitioner questions (Pet. 16-17) whether an agreement was formed at all, he cannot deny that the jury must have concluded that it was. Second, there was no possibility here that the jury could have concluded that petitioner's conspiratorial agreement extended only to domestic dealing in firearms, because the jury found that he intended to export the firearms illegally (see Pet. App. 10a). Indeed, petitioner acknowledges (Pet. 15, 26), as he has proclaimed throughout, that his intention, and that of his associates, was to export the firearms in question. Thus, while petitioner questions the adequacy of the proof of the attempted illegal export (see pages 11-12, *infra*), he cannot deny that the jury found that the criminal agreement included exportation without the required license. There is accordingly no merit to petitioner's contention (Pet. 15-16) that the conspiracy conviction rested only on a jury's finding that petitioner conspired to engage in domestic arms transactions.

The correctness of the decision below upholding the conspiracy conviction is especially clear in light of the district court's instructions to the jury. The court explained, with reference to the conspiracy count, that

> [t]he gist of the offense in this indictment is the combination or agreement to export to Lebanon the arms * * * which the Court has previously mentioned without a license or written approval from the Department of State.

Pet. App. 21a. This charge assuredly focused the jury's attention on the unity of the evidence regarding the formation and scope of the conspiracy as it applied to the two objectives charged.

b. Contrary to petitioner's contention (Pet. 7-9), the Court is not called upon to resolve an irreconcilable conflict among the courts of appeals in this case, for none of the decisions claimed to be inconsistent with the result in the instant case reverses a conviction upon a multiple objective conspiracy count where, as here, the relationship of the objectives was such that the jury's verdict as to a particular objective held to constitute an offense was manifest. Rather, in each of the cases cited, the reviewing court deemed itself unable to discern whether the jury had found the elements of a conspiracy to commit an unlawful act. In *United States* v. *Baranski*, 484 F. 2d 556, 560-561 (7th Cir. 1973), defendants were acquitted on *all* of the substantive counts, and the court of appeals overturned the conspiracy conviction upon finding that one of the three substantive offenses charged, and incorporated in the conspiracy count as an object, could not constitutionally be treated as a crime. Because the court agreed that "on the basis of the evidence" the jury might have found no conspiracy to commit the remaining offenses, and that it was impossible to

discern the jury's actual verdict, the conspiracy conviction was reversed.[4]

Nor is the Ninth Circuit's narrow decision in *United States* v. *Carman*, 577 F. 2d 556 (1978), irreconcilable with the decision below. Although the *Carman* court overturned a conspiracy conviction when it concluded that one of the underlying substantive counts did not charge a federal offense, the court acknowledged that where it could be determined that the jury "focused on other crimes" charged as well as the substantive count held defective "the conspiracy conviction should be sustained." *Id.* at 567-568. For the reasons stated above this is just such a case. The result in *United States* v. *Dansker*, 537 F. 2d 40 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977), likewise does not conflict with the decision below. In *Dansker*, the defendants were convicted on all counts of a three count indictment alleging conspiracy to commit bribery of two individuals, and bribery of each, in separate counts. The court of appeals vacated one of the two bribery counts concluding that what was offered was not, in law, a bribe. 537 F. 2d at 50-51. The conspiracy count was vacated as well because of the possibility that the jury had found a conspiracy to commit only the acts held lawful, the court noting the possibility that the defendants acted without a common plan in executing the

---

[4]In *Van Liew* v. *United States*, 321 F. 2d 664, 672 (5th Cir. 1963) (emphasis in original), the court reversed a conspiracy conviction after concluding that the indictment was defective with respect to one of the two kinds of underlying substantive offenses charged, remarking that "[t]he guilty verdict was general. With inquiry forever foreclosed, it is just as likely that the verdict was based on the *insufficient* charge * * * as on * * * [the remaining objective offense]." But in *Van Liew* there was apparently no identity between the acts charged under the two substantive offenses incorporated in the conspiracy charge; each related to a separate incident. *Id.* at 667 n.2. Moreover, the *Van Liew* court ultimately held the remaining substantive counts defective (*id.* at 673-674), and the reasoning cited above was accordingly not essential to the result.

bribe that was the subject of the valid substantive count. *Id.* at 51. No such possibility exists in this case, because the criminal conduct underlying Count One, and the criminal agreement that is an element of the conspiracy count, insofar as it rests on Count One, are wholly subsumed in the other branch of the conspiracy count. *United States* v. *Tarnopol,* 561 F. 2d 466, 473-475 (3d Cir. 1977), is also distinguishable because the three objects of the conspiracy there charged were disparate rather than overlapping and there was accordingly uncertainty on appeal as to whether all of the elements of a conspiracy to commit an act held to be a crime had been found.

2. Petitioner challenges (Pet. 16-22) his conviction for "conspiracy to attempt to export" firearms on the ground that a "conspiracy to attempt" a substantive offense does not constitute a crime. The court of appeals properly rejected this claim (Pet. App. 11a-12a). As the court observed, *attempting* to export firearms without a license is specifically prohibited[5]; accordingly, a charge of conspiracy to attempt, based on the general conspiracy offense created by 18 U.S.C. 371 and the applicable, specific prohibition, is permissible. Even assuming that "conspiracy to export" would have been the preferable charge, however, petitioner suffered no prejudice from the inartful drafting. The indictment, given a common-sense construction, clearly put petitioner on notice of the charge against him; it protects him from a subsequent prosecution for the same offense;

---

[5]22 C.F.R. 127.01, promulgated under the authority of 22 U.S.C. 2778(c), provides:

> (a) It is unlawful to export or attempt to export from the United States any article * * * for which a license or approval is required * * * without first obtaining the required license or written approval from the Department of State.

22 C.F.R. 123.01 and 127.03, cited in the indictment, respectively impose the export license requirement, and apply the criminal sanction of 22 U.S.C. 2778(c) to violations, *inter alia*, of 22 C.F.R. 127.01.

and it insures that he was prosecuted for the charges considered by the grand jury when it handed down the indictment. See *Hamling* v. *United States*, 418 U.S. 87, 117 (1974); *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962).[6]

Petitioner's suggestion (Pet. 18) that this case presents an inter-circuit conflict regarding "conspiracy to attempt" charges, is unpersuasive. Rather the court of appeals, in a discussion (Pet. App. 11a-12a & nn.14, 15) upon which we rely, properly harmonized *United States* v. *Clay*, 495 F. 2d 700 (7th Cir.), cert. denied, 419 U.S. 937 (1974), and *United States* v. *Meacham*, 626 F. 2d 503 (5th Cir. 1980), the cases cited by petitioner, distinguishing *Meacham*, and relying upon *Clay*. The *Meacham* court also distinguished *Clay*,

---

[6]The indictment charged an incomplete offense, the object of which was the crime of exporting firearms without the required license. Petitioner's suggestion (Pet. 21) that he was charged with conspiracy to fail in the commission of a crime is frivolous, for failure is not an element of an "attempt" offense in any sense relevant here—it merely serves to distinguish the inchoate crime from the complete offense. In any event, the district court's jury instructions on the conspiracy count (Pet. App. 21a-28a) make it plain that the offense charged was not the absurdity suggested by petitioner. These were ordinary conspiracy instructions, applied to the two underlying offenses. The district court did not refuse to instruct the jury on this offense, as petitioner claims (Pet. 19), but evidently declined to adopt the peculiar and unsound construction advanced by petitioner. And nothing in the instructions permitted the jury to convict based upon a showing of criminal conduct insufficiently complete to "justify the intervention of the criminal law." *United States* v. *Feola*, 420 U.S. 671, 694 (1975). Rather, under the instructions given, the evidence clearly supported and the jury surely found a conspiracy to commit the completed offense of exporting without a license. Whether or not a conspiracy to attempt a crime is always tantamount to conspiracy to commit the crime, as appears logically to be the case, there can be little doubt of the soundness of the conviction in this case.

Petitioner's suggestion (Pet. 17-18) that Congress did not intend to create the conspiracy offense at issue is simply inconsistent with the adoption of Section 371's general prohibition on conspiracies "to commit any offense against the United States."

finding it unnecessary to "reach the more elusive question at issue in *Clay*." 626 F. 2d at 509. There is accordingly no warrant for further review.

3. Petitioner's final contention (Pet. 22-29) is that, in order to convict him of attempted unlawful export of firearms, the government was obliged to show exactly "where, when and how the substantive offense would occur" (*id.* at 22). Petitioner cites no authority that directly supports this remarkable proposition, and we are aware of none. So long as the elements of an offense are proven with reasonable definiteness, additional details about the methods used to violate the law can have at most corroborative evidentiary significance. Petitioner seeks (Pet. 26-28) to tie the restrictive rule advanced to the requirement that, in addition to mere intent to commit a crime, a "substantial step" toward consummation of the crime must be shown in order to obtain a conviction for attempt. See, *e.g.*, *United States* v. *Mandujano*, 499 F. 2d 370, 373-377 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975). However, the court of appeals applied (Pet. App. 8a-10a) the very analysis commended by petitioner, concluding (*id.* at 10a; citation omitted) that the evidence demonstrated that petitioner's conduct had "progressed sufficiently to minimize the risk of an unfair conviction." And assuming that, as the jury concluded, petitioner planned to export the firearms he bought illegally, the acquisition of the firearms is surely a substantial step toward that goal.[7] Petitioner's contention is accordingly reduced to a challenge to the sufficiency of the evidence—a challenge rejected by the district court (see Pet. App. 4a) and the court of appeals (*id.* at 9a-10a). No reason has been

---

[7]Petitioner's reliance (Pet. 26-28) on § 5.01(2)(f) of the Mode l Penal Code (Prop. Official Draft, 1962) is misplaced, for that provision merely sets forth one of seven sets of circumstances which, the Code states, "shall not be held insufficient as a matter of law," the listing of which does not "negativ[e] the sufficiency of other conduct."

demonstrated for a departure from this Court's practice of declining to reconsider such factual matters.

In any event, the court of appeals correctly determined that the evidence at trial supported petitioner's conviction on Count Two (see Pet. App. 2a-4a, 9a-10a). The evidence clearly pointed to petitioner's intent to ship large quantities of firearms to Lebanon without going through proper and legal channels. Indeed, throughout the period of negotiations on the purchase of the guns for exportation to Lebanon, petitioner never applied for the necessary export license. J.A. 503, 2684. Moreover, the evidence showed that petitioner believed that the 110 weapons, which he bought to send to Lebanon, were stolen firearms. Finally, after his arrest petitioner falsely disclaimed any prior knowledge of the handguns. Based on this evidence, the jury reasonably rejected petitioner's defense that he intended to transport the crates containing the firearms to his home, where he would store them while he applied for the license.[8]

---

[8]The evidence actually covered the particulars petitioner claims had to be proven, reflecting that petitioner planned to send the guns to New York City for immediate export to Lebanon. The time was established in a conversation between petitioner and a firearms dealer cooperating with the government, in which petitioner stated that the arranged pickup time for the guns would "leave us more than six, seven hours" (Pet. App. 9a-10a). The means to be used could be inferred from petitioner's conversations concerning transportation of weapons to Lebanon by air and was corroborated by his concurrence in a dealer's reference to petitioner's intention to "fly them the hell out of here" (*id.* at 10a n.13). Petitioner's inquiry to a BATF agent posing as a guard at the warehouse where the guns were delivered as to the best route to New York City suggested that the guns would be flown out of that city (*id.* at 10a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

SARA CRISCITELLI
Attorney

AUGUST 1981

DOJ-1981-08

Office-Supreme Court, U.S.
FILED
SEP 21 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANTOINE MOWAD,

Petitioner,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

DOUGLAS GILMORE
11 Harding Lane
Westport, Connecticut 06880
(203) 226-6277

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. Where one objective of a multi-objective federal conspiracy does not state an offense, may the conspiracy conviction stand upon another objective, when the District Court has charged the jury that a conviction could rest of any one objective without violating the Supreme Court's decision in *Stromberg v. State of California*?

II. (a) Did Congress intend for the general conspiracy statute, 18 U.S.C. Section 371, to be utilized to create the unique criminal offense of *conspiracy to attempt*?

(b) Did the Congress intend for the general conspiracy statute, 18 U.S.C. Section 371, to be combined with State Department regulation 22 C.F.R. Section 127.01 to create the unique offense of *conspiracy to attempt* to export without a license?

III. May a lawfully registered exporter of firearms with the Department of State be convicted of an attempt to export firearms without an export license where the specific place, time and manner of the alleged illegal exportation is unknown?

TABLE OF CONTENTS

PAGE

Questions Presented i
Table of Authorities Cited iii
Cases Cited iii
Statutes and Regulations Cited iii
Petitioner's Reply 1

I

1. The Government In Their Brief In Opposition Has Ignored The Question Presented Raised In Petitioner's Writ Of Certiorari 1

(a) It is fundamental to our system of justice that before a person may be convicted of an offense, it must 1) be a valid offense and 2) the jury must be clearly charged to consider it 1

2. The Government's Claim That There Is No Irreconcilable Conflict Is A Flat Misstatement Of The Law 5

II

3. Congress Never Intended To Create The Offense Of Conspiracy To Attempt 7

III

4. A Defendant May Not Be Convicted Of A Federal Criminal Attempt If It Is Unknown Exactly When, Where Or How The Alleged Substantive Offense Will Occur ... 8

CONCLUSION 10

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Chiarella v. United States, 445 U.S. 222, 100 S.Ct. 1108, 63 L.Ed. 2d 348 (1980)	5
Samuel v. United States, 169 F. 2d 787 (9th Cir. 1948)	6
Stromberg v. State of California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931)	2, 4, 5, 6, 7
Swan and Finch Company v. United States, 190 U.S. 143, 23 S.Ct. 702, 47 L.Ed. 984 (1902)	9
United States v. Baranski, 484 F.2d 556 (7th Cir. 1973)	2, 5, 6
United States v. Carman, 577 F.2d 556 (9th Cir. 1978)	2, 5, 6
United States v. Dansker, 537 F.2d 40 (3rd Cir. 1976)	2, 6
United States v. Dixon, 536 F.2d 1388 (2d Cir. 1976)	2, 7
United States v. Mowad, 641 F.2d 1067 (2d Cir. 1981)	2, 3
United States v. Tarnopol, 561 F.2d 466 (3rd Cir. 1977)	2, 6, 7
Van Liew v. United States, 321 F.2d 664 (5th Cir. 1963)	7

STATUTES AND REGULATIONS INVOLVED

Title 18 U.S.C. Section 922(a)(1)	3
Title 22 U.S.C. Section 2778(b)(1)	10
Title 22 C.F.R. Section 122.01(a)	10

No. 80-2196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANTOINE MOWAD,

Petitioner,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

Antoine Mowad respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on February 17, 1981.

PETITIONER'S REPLY

I

1. THE GOVERNMENT IN THEIR BRIEF IN OPPOSITION HAS IGNORED THE QUESTION PRESENTED RAISED IN PETITIONER'S WRIT OF CERTIORARI.

(a) It is fundamental to our system of justice that before a person may be convicted of an offense, it must 1) be a valid offense and 2) the jury must be clearly charged to consider it.

The Government attempts to bury a wide split among the federal circuits on a recurring federal conspiracy issue, which results in

reversal in one Circuit and affirmance in another. The Government sidesteps the question as to whether a criminal defendant's freedom should be decided only on the quality of the evidence or in addition by the locality of the Court of Appeals. If petitioner's case had arisen in the 3rd, 7th or 9th Circuits, his conspiracy conviction would have been reversed. *United States v. Dansker*, 537 F. 2d 40, 51 (3rd Cir. 1976); *United States v. Tarnopol*, 561 F. 2d 466, 473-474 (3rd Cir. 1977); *United States v. Baranski*, 484 F. 2d 556, 559-561 (7th Cir. 1973) and *United States v. Carman*, 577 F. 2d 556, 566-568 (9th Cir. 1978). In the Second Circuit, it was affirmed. *United States v. Mowad*, 641 F. 2d 1067, 1073-1074 (2d Cir. 1981); *United States v. Dixon*, 536 F. 2d 1388, 1402 (2d Cir. 1976). It is petitioner's position that the varying addresses should not have been the seminal consideration, and that this is a traditional ground for Supreme Court review.

In the 7th and 9th Circuits reversal is *required* by the Supreme Court's decision in *Stromberg v. State of California*, 283 U.S. 359, 367-368, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931). The Government argues that the 7th and 9th Circuits are wrong in their position. That is not the issue at this stage. These Circuits believe they are right and that *Stromberg* requires reversal. The fact that the Government does not believe that *Stromberg* requires this result, does not change the position of the 7th or 9th Circuits, nor the discriminatory results form Circuit to Circuit.

Nowhere in the Government's Brief in Opposition do they even recognize the Question Presented: Where one objective of a multi-objective federal conspiracy does not state an offense, may the conspiracy conviction stand upon another objective, *when the District Court has charged the jury that a conviction could rest on any one objective*, without violating the Supreme Court's decision in *Stromberg v. State of California*?

Since the jury in petitioner's case was charged that his conviction could rest upon "some object", how can we know that when petitioner was found guilty upon the first object, which the Court of Appeals subsequently held does not state an offense, the jury *even considered* the second object which was the bizarre and conceptually incomprehensible "conspiracy to attempt" to export? The Government assumes the jury considered the valid objective in the conspiracy charge. How can the Government assume this when the District Court charged the jury that a finding of guilt upon any

object would suffice? To make a man a convicted felon, more than the Government's assurances are required. The Government is willing to gamble and to guess, petitioner is not.

The Court should remember that in the Second Circuit no scienter is required for a conviction under 18 U.S.C. Section 922(a)(1), the invalidated offense under Count I. *United States v. Mowad, supra,* at 1072 n.10. Therefore, the petitioner at trial could not defend his failure to have a dealer's license under Count I on the belief that a lawful exportation as a registered exporter with the State department was sufficient. Further, since the District Court incredibly charged the jury that "dealing" included "exporting" the petitioner's defense that as a registered exporter he intended to lawfully export, was a valid defense under Count II — the charge of attempted exportation — but an admission of guilt under Count I — the dealing charge — since no scienter is required and a good faith belief that one is complying with the exportation laws is not a defense to an unlawful dealing charge. So, by claiming innocence under Count II, petitioner was confessing under Count I. Therefore, when the jury considered Count III, the conspiracy charge, and came upon the first objective, which was the conspiracy to deal, there can be little doubt that the jury under a "some object" charge by the District Court, felt it unnecessary to deal with the conceptually unintelligible "conspiracy to attempt" to export objective.

For the Government to now come before the Supreme Court and claim the jury convicted petitioner on this "conspiracy to attempt" to export objective, is not only incorrect but an unfair argument which could only lead this Court to a complete miscarriage of justice. Petitioner who in this case had to carry the disabling burden of the poor judgment of the Government, Grand Jury and District Court by the bringing and failure to dismiss the dealing charge, which poisoned his trial, should not now be robbed of a hearing before this Court because of a claim that the jury must have found him guilty of a second objective, which the jury not only never considered, but which was never even candidly explained by the District Court for the simple reason that the reported decisions nowhere record even one individual who has ever been convicted of a "conspiracy to attempt" to export, no doubt due to the fact no one has ever considered it an offense.

Petitioner assumes the jury did as the District Court instructed, and therefore the second objective was never considered, and that his conspiracy conviction to this day rests upon the invalid objective.

Further, the Government's statement that a conspiracy to deal automatically infers a "conspiracy to attempt" to export is both factually and legally incorrect. The petitioner was a lawfully registered exporter with the Department of State. If the dealing objective had been excluded, as it should have been, from the jury's consideration, the jury may have well found that petitioner's alleged coconspirators — two of whom were foreign nationals and who undisputedly spoke and understood no English — had relied upon the petitioner's export registration and that he would therefore legally export. Petitioner testified at trial that all concerned were aware of his registration with the Department of State. The petitioner did not secure a dealer's license, because he believed none was required — and he was right! However, the jury knew none of this — his belief no license was required, or that he would be found legally correct in is judgment by the Court of Appeals. To say the jury's finding of guilt on the bogus dealing objective assures they found petitioner guilty of the "conspiracy to attempt" to export charge, is contrary to the facts, law and charge by the District Court, who stated that a conviction on "some object"was sufficient. A dealer's license and an export license are two separate licenses. The Government tries to equate them as one license, one charge. They, of course, are not. The Government argues petitioner's guilt on the second objective by his conviction on the invalid objective. Such an artificial verdict of guilt does little to enhance the public's constitutional protections.

The Government has completely ignored the Question Presented and the charge by the District Court permitting conviction upon one objective of the conspiracy. When the District Court's charge is considered with the fact that the invalid dealing objective was the first listed in the conspiracy count and that the second objective was the "conspiracy to attempt" charge, the recent words of this Court, citing the *Stromberg* decision are dispositive:

> We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been

> punished for noncriminal conduct. *Chiarella v. United States*, 445 U.S. 222,237 n.21,100 S.Ct. 1108, 1119, 63 L.Ed. 2d 348 (1980).

This at a minimum requires the Federal Courts not to permit a conviction upon any one of several objects where one objective is invalid. This was the purpose of the *Stromberg* decision, which is the basis of the split in the Circuits and Question Presented before this Court.

2. THE GOVERNMENT'S CLAIM THAT THERE IS NO IRRECONCILABLE CONFLICT IS A FLAT MISSTATEMENT OF THE LAW.

The Government's effort to claim that there is no "irreconcilable conflict" in the Circuits is patently incorrect. The conflict among the Circuits is clearly established in petitioner's Writ of Certiorari (Petition For Writ of Certiorari, pp. 7-17). In fact, there are conflicting panel decisions within two Circuits, the 5th and 7th Circuits. (Petition For Writ of Certiorari, p. 8). The conflict in the 7th Circuit was even recognized as such in the 9th Circuit's decision in *United States v. Carman, supra* at 566.

Despite the Government's attempt to distort the decisions of the various Court of Appeals, there can be no doubt of their meaning. In *United States v. Baranski, supra* at 560-561, the Court in reversing a multi-objective conspiracy charge, where one object was found to be unconstitutional, rested its decision upon the "analogous situation" in *Stromberg v. State of California,* and left no doubt as to the controlling logic of the Circuit's decision:

> Because the jury returned a general verdict on that count, we cannot know which of the three statutes the violations of which were the 'objects' of the conspiracy the jury relied on in convicting the defendants. The trial court had instructed the jury that actions taken to attain any of the three alleged objects would suffice for conviction. *United States v. Baranski, supra,* at 560.

As to which object the jury based its conviction, the Court stated: "We decline to speculate on such a matter". *Id.*, at 561. The Court further held:

> The controlling matter here in our opinion, is not the proof upon which the jury might have convicted under the conspiracy count but rather the proof upon which the jury did convict. *Ibid.*

In *United States v. Carman, supra,* at 566-569, the Court reversed a conspiracy conviction, where, as here, one object of a multi-objective conspiracy failed to state an offense. The Court not only recognized the split both among and within the Circuits, which the Government disputes, but reviewed an en banc decision within the Circuit, *Samuel v. United States,* 169 F.2d 787, 798 (9th Cir. 1948)(en banc), as well as this Court's decision in *Stromberg v. State of California* and held: "These decisions we believe compel the result we have reached", *United States v. Carman, supra,* at 566, the reversal of the conspiracy count. The Court specifically held that the failure of a substantive charge to state an offense, which was one of several objects of the conspiracy charge, required reversal ("The appellant asserts that this possibility demolished the entire conspiracy conviction. We agree". *Ibid.*).

In *United States v. Dansker, supra,* at 51, the Court, finding the evidence insufficient to establish the substantive offense of bribery of one Serota, reversed the conspiracy conviction which charged two objects — the bribery of Serota and one Ross. The Court held that because the District Court charged that the conspiracy could rest upon either bribe, the conviction had to be reversed, even though the Court found it unlikely that the jury had found the conspiracy only upon the Serota bribe, the invalid object. The mere possibility that only the invalid objective was considered or found by the jury to support the conviction, was sufficient to mandate reversal. Again, the issue was not the evidence as to the valid objective, but simply whether one objective was invalid and whether the District Court's charge permitted a conviction solely upon the invalid object.

The decision in *United States v. Tarnopol, supra,* at 473-474, is best explained by the following quote:

> The jury rendered a general verdict of guilt on the conspiracy count under instructions by the trial judge that the defendants could be found guilty on

> this count if the jury found that the defendants had engaged in any one or more of the illegal activities alleged in the count as objectives of the conspiracy. Under these circumstances, it is impossible to determine whether or not the jury based its verdict upon less than all three of these activities and, if so, upon which ones the verdict was found. *Ibid.*

Accord: *Van Liew v. United States*, 321 F. 2d 664, 672 (5th Cir. 1963).

Each of these decisions stand unquestionably for the legal proposition that where one "object" of a multi-objective conspiracy fails to state a valid offense, the District Court charge that conviction may rest on any object, requires reversal. Both the 7th and 9th Circuits are of the opinion that the Supreme Court's decision in *Stromberg v. State of California* requires this result. The Government's claim that these decisions stand for the proposition that the Courts will review the evidence to determine whether the jury found guilt upon a valid object, is not the holding of these decisions, but rather is the position taken by the minority Circuits, such as the Second Circuit. *United States v. Dixon, supra* at 1402, which are not cited in the Government's brief. It is precisely this conflict, recognized by the Courts themselves, which we ask the Supreme Court to resolve, particularly inasmuch as two Circuits are of the opinion that reversal in petitioner's case is required by *Stromberg v. State of California.*

II

3. CONGRESS NEVER INTENDED TO CREATE THE OFFENSE OF CONSPIRACY TO ATTEMPT.

It is 2½ years since the original indictment in this case, yet the Government still cannot decide whether the only remaining "valid" objective of the conspiracy count — the "conspiracy to attempt" — is "the only appropriate charge" (A-2006), or "inartful drafting" as now claimed in the Government's Brief in Opposition. (Brief for The U.S. in Opp., p. 9; see also Government's brief before the Court of Appeals, pp. 22-23).

This is only one of the many unanswered questions as to this object. Is "conspiracy to attempt" a separate offense from

"conspiracy to export"? Is it the same offense? If it is, why did the Government claim it as "the only appropriate charge"? Did the Grand Jury feel a "conspiracy to export" could not be brought but only a "conspiracy to attempt"? If so, what is the legal distinction between the offenses? Is a separate jury charge required for a "conspiracy to attempt"? If so, what is it? Does a "conspiracy to attempt" require a finding of an "overt act" toward a "substantial step"?

The District Court admitted that Her Honor did not believe such a charge existed. The Court of Appeals gave no explanation for finding such an offense, nor defining it. There is no way petitioner could defend against a charge when the Government couldn't decide which one was intended, the District Court didn't believe one existed and the Court of Appeals didn't explain it. The charge should not be made to fit the conviction.

How can a federal criminal defendant be convicted of a "conspiracy to attempt" when no federal court has ever explained what it means? If the Goverment, District Court and the Court of Appeals must pause as to its meaning, one may only guess as to the difficulty encountered by the jury. Unless, of course, the jury obeyed the District Court's charge and convicted solely upon the invalid dealing objective.

III

4. A DEFENDANT MAY NOT BE CONVICTED OF A FEDERAL CRIMINAL ATTEMPT IF IT IS UNKNOWN EXACTLY WHEN, WHERE OR HOW THE ALLEGED SUBSTANTIVE OFFENSE WILL OCCUR.

The Government fails to come to grips with the reality of the conduct which underlies the alleged offense. There is no reported federal attempt case where the place, time and manner of the alleged substantive offense was unknown. The Government states that we offer no case for this proposition. Never before has a federal criminal defendant been convicted for an attempt under such extraordinary circumstances. The decision in this case is so perverse, such a departure from the general attempt cases, that the only precedent available is all the federal precedent on the doctrine of attempt — where the place, time and manner of the alleged attempt is apparent in every case. The attempt is uniformly at the

scene of the substantive offense, or so near the scene as to be unquestionably identifiable. The time of commission is imminent and the manner is apparent by the very attempt to complete the substantive conduct.

Bearing in mind that the attempt here is the "severance of goods" from a port of exit of the United States without an export license, *Swan and Finch Company v. United States,* 190 U.S. 143, 145,23 S.Ct. 702, 703,47 L.Ed. 984 (1902), the petitioner, who was lawfully registered with the Department of State to export these very firearms in question, was arrested after making a lawful purchase from federally licensed firearms dealers during regular business hours. The petitioner arrived at the gun shop to purchase his firearms, then was taken by the Government informants to a warehouse in an informant's car, leaving one of petitioner's cars back at the gunshop, and was then arrested at the warehouse for an attempt to export firearms without an export license. The Government's claim is that four adult men, with two mammoth packing crates, unmarked, and with no marking materials on any person arrested, were to pile into one car, leaving their other car at the gunshop, and drive to some unidentifiable port of export to immediately and illegally export these firearms to Lebanon. But, incredibly, it does not stop here.

Further, the Government claims that petitioner asked an ATF agent at the warehouse the best route to New York City. The Government contends this establishes that the firearms were to flown out of one of the New York airports that day. Even if we assume that a smuggler would attempt to illegally export without knowing where the port of export was, and would rely upon the chance he would meet someone along the way who would know the route — this while carrying the alleged contraband goods in two huge crates, in which are 110 handguns all in boxes marked "Colt" — no one would ask how to go to "New York City" if he wanted to know how to arrive at either J.F.K. or LaGuardia, unless the Government's claim is that the port of exit to Lebanon was the Manhattan heliport. This is not to mention that petitioner's passport, offered in evidence by the Government, showed several entry stampings into the United States in New York. (Government Exhibit 31, A-2762-2765).

The Government's own evidence established that petitioner was a registered exporter of those category of firearms, and that all registered exporters automatically receive the export applications to secure individual export licenses. As such, his conduct was as completely consistent with applying for an export license as with anything else. The Government claims petitioner is a smuggler who registered with the Department of State as one "engaging in the business of exporting firearms", 22 U.S.C. Section 2778(b)(1), 22 C.F.R. Section 122.01, paying a fee of $500, and who on the alleged day of the alleged illegal act didn't know how to get to the place of export. On this logic, petitioner is in prison.

Even assuming the peitioner wanted to export illegally, there is no way of knowing if the substantive offense — the actual export — would have occurred in a week, a month or a year.

In this case the elements of time and distance have been eliminated by the Second Circuit, a dramatic change in the law. This issue the Government fails to recognize in their Brief in Opposition. It is this revolution in the character of the federal attempt doctrine, which petitioner asks this Court to review.

CONCLUSION

The petitioner respectfully requests that the writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Second Circuit and that the Court summarily reverse the judgment of the court of Appeals or set the case down for oral argument or such other consideration as the Court deems appropriate.

Respectfully submitted,

Dated: September 15, 1981

DOUGLAS GILMORE
11 Harding Lane
Westport, Connecticut 06880
(203) 226-6277
Attorney for Petitioner,
Antoine Mowad